

(25,512)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 682.

THE NEW ORLEANS AND NORTHEASTERN RAILROAD
COMPANY AND UNITED STATES FIDELITY AND
GUARANTY COMPANY, PLAINTIFFS IN ERROR,

vs.

CHENEY HARRIS, ADMINISTRATRIX OF THE ESTATE
OF VAN HARRIS, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
MISSISSIPPI.

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a Pleas and Proceedings Had and Done at a Regular Term of the Supreme Court of the State of Mississippi, Begun and Held at the Court-room, in the Capitol, in the City of Jackson, on the First Monday, Being the 6th Day, of March, 1916, Division B Sitting.

Present: The Honorable Sam C. Cook, Presiding Justice; the Honorable J. Morgan Stephens and the Honorable Clayton D. Potter, Associate Justices; Geo. C. Myers, Clerk, and C. L. Johnson, Marshal.

Be it remembered—That heretofore, to wit, on the 1st day of February, 1915, there was filed in the office of the Clerk of said Court, a certain transcript of the record on appeal from the Circuit Court of Lauderdale County, Mississippi, which, with the endorsements thereon, is in words and figures following, to wit:

b In the Circuit — of Lauderdale County, September Civil Term, 1914.

CHENEY HARRIS, *Administrator*,

vs.

NEW ORLEANS & N. E. R. R. Co.

Judgment in Favor of the Plaintiff, \$2,000.00.

Fewell and Cameron, Att'ys for Plaintiff.

A. S. Bozeman, Att'y for Defendant.

1 *Orgination of Court, September Civil Term, 1914.*

STATE OF MISSISSIPPI,
Lauderdale County:

Be it remembered that a regular term of the Circuit Court of Lauderdale County, Mississippi, was begun and held thin day in the courthouse of said county and state; it being the 4th Monday of September, 1914, and the 28th day of September, 1914, and the time and place designated by law for the holding of said *County*.

The said term of Court is held for the trial of Civil business only, as provided by law.

Present and in attendance of said Court Hon. John L. Buckley, Judge of the Tenth Judicial Circuit Court District of the St-te of Mississippi, sole presiding.

J. H. Kennedy, Sheriff of Lauderdale County, Jesse Lee Ward, Official Court Stenographer of said District and R. L. Harbour, Clerk of the Circuit Court of said County and St-te.

Be it further remembered that among other causes coming on for trial at the abov- term of Court was that of Cheney Harris vs. The

New Orleans & Northeastern Railroad Company, which is in words and figures as follows, to-wit:

Plaintiff's Declaration.

Filed May 23rd, 1914. R. L. Harbour, Clerk.

STATE OF MISSISSIPPI,
Lauderdale County:

In the Circuit Court, September Term, 1914.

CHENEY HARRIS, Administratrix,
vs.
NEW ORLEANS & NORTH EASTERN RAILROAD CO.

Comes the plaintiff, Cheney Harris, Administratrix, she having been duly appointed by the Chancery Court, Lauderdale County, Mississippi, copies of the letter given to her as such administratrix being hereto attached and marked Exhibit "., and sues the defendant New Orleans & North Eastern R. R. Co., a corporation organized under the laws of the State of Louisiana, in an action of trespass on the case.

For that heretofore to-wit: On the 5th day of February, 1914, the said N. O. & N. E. R. R. Co., was engaged in the business of a Common Carrier, operating its trains of cars between the State of Louisiana and the State of Mississippi, said cars being loaded with Inter-State Commerce, and that on said 5th day of February, 1914, the said defendant undertook to operate a freight train out of the City of New Orleans, which said train was loaded with commerce, and which said train was engaged in Inter-State Commerce, and that then and there the liability of said defendant for the injury and death of its employees was secured by the Act of Congress of the United States, in what is known as the Employers' Liability Act.

The Plaintiff charges that one Van Harris, who was the son and sole support of the plaintiff, had long been employed and had long served the said defendant N. O. & N. E. R. R. Co., as a brakeman. The said Van Harris was an able bodied strong and healthy man, that on said 5th day of February, he having been called out by the defendant, to act as a brakeman on said defendant's freight train, said Van Harris went to the Round-House of said defendant Company in the City of New Orleans, and assisted in getting out
3 one of the defendant's engines, and was acting as brakeman on said engine, giving the signals to said engineer in charge thereof; in backing up said engine so as to couple same to the train of cars which defendant intended should be brought from the said City of New Orleans to City of Meridian, Lauderdale County, Mississippi.

The Plaintiff charges that when said engine, in its backing motion came close to said train of cars, that the deceased, Van Harris, got off the engine onto the ground, and began to signal the said

engineer to slowly back said engine until he could couple said engine to said train of cars.

The Plaintiff charges that this coupling, through the negligence of said engineer, was made negligently in this, that the said engine was backed against said train of cars in a reckless and negligent way.

The Plaintiff charges that it became the duty of said deceased, Van Harris, upon the coupling being made, to couple up the air hose, between the tender of the engine and the first car of the train, and that upon his signalling the engineer to back up and make the coupling, and the coupling having been made, the said Van Harris crossed over the track and stopped for the purpose of coupling the air hose, and that while in this position and without any warning from the engineer or fireman, in charge of said engine, said defendant's servants in charge of same, recklessly and through gross negligence propelled said engine against the cars of said train with such force and at such speed so as to knock the deceased, Van Harris down and run over said Van Harris, and that said Engine upon striking said train with the force hereinabove set out, was further backed against said cars until the deceased, Van Harris was ground under the wheels of the tender of said engine and crushed and ground to death,

and that said engineer in charge of said train, did not stop said engine until after the wheels of said engine had mounted the body of Van Harris. That by reason of the negligence hereinabove set out, the defendant Railroad Company is liable for the killing of said Van Harris, and the Administratrix is given the right to sue by the Act of Congress, she therefore brings this, her suit, and demands judgment against the defendant for the sum of Ten Thousand Dollars, (\$10,000.00).

Second Count.

The Plaintiff, Cheney Harris, Administratrix, sues the New Orleans & North Eastern R. R. Co., for the death of her son, Van Harris, who was killed by said defendant, Railroad Company, and by the negligent running of said defendant's locomotive and cars in the City of New Orleans, on the 5th day of February. Plaintiff charges that said Van Harris was 25 years of age, his expectancy was 38.81 years, that she was the mother and dependant upon said Van Harris, she therefore sues and demands judgment against said defendant Railroad Company in the sum of Ten Thousand Dollars (\$10,000.00).

Third Count.

The Plaintiff, Cheney Harris, Administratrix of the estate of Van Harris, and mother of deceased, sues the defendant the New Orleans & North Eastern R. R. Co., a corporation engaged as a common carrier, and engaged in inter-state commerce on its tracks on the 5th day of February, 1914, and charges that under the Acts of Congress made and provided for the protection of the employees of inter-state Railroads it became the duty, and was the bound-duty of said Rail-

road Company to equip its cars and engines with Automatic Couplers so as to permit the coupling to be made without the necessity of the brakeman or employee going in between the cars.

The Plaintiff charges that this duty resting upon the defendant was not performed by the said Railroad Co., but that on the contrary on the 5th day of February, 1914, the defendant had an engine in charge of its engineer, one Fred Stroble, which was then and there ordered out by said defendant for the purpose of bringing a freight train from the City of New Orleans to the City of Meridian.

The Plaintiff charges that said engine and front car of said train were not equipped with an Automatic Coupler as the law requires, that the coupler failed to couple automatically, as the law requires, and that by reason thereof, it became and was the duty of the deceased, Van Harris, to go in between the cars and the tender of said engine for the purpose of completing the couple and that it then and there became necessary for the engineer in charge of said engine to hit the front car on said train with such force for the purpose of making the coupling between said engine and front car, and that in so doing, the deceased, Van Harris, was crushed, his bones broken, and his body mutilated and the wheels of said engine run against and onto the body of said Van Harris, from which injury said Van Harris died; The Plaintiff charges that Van Harris was of the age of 25 years, had long been employed by the R. R. Co., had served them faithfully and was an able bodied and healthy man. He was earning — dollars per month, his expectancy of life was 38.81 years.

The Plaintiff charges that said R. R. Co. then and there became liable in damages for the said wrongful death, and she, therefore, as administratrix, brings this, her suit against the defendant R. R. Co., and demands judgment in the sum of Ten Thousand Dollars, (\$10,000.00).

FEWELL & CAMERON,
Attorneys for Plaintiff.

6 EXHIBIT "A" TO PLAINTIFF'S DECLARATION LETTER OF ADMINISTRATION.

THE STATE OF MISSISSIPPI,
Lauderdale County:

By the Chancery Court of said County.

Whereas, Van Harris, deceased, late of said County, died intestate, as we are informed, having whilst he lived, and at the time of his death, divers goods and chattels, rights and credits, within this State; and we, desiring that the said goods and chattels, rights and credits, may be well and truly administered, converted, and disposed of, do hereby grant unto Chenzy Harris, full power by the tenor of these presents, to administer the goods and chattels, rights and credits, which to the said deceased in his lifetime, and at the time of her

death, did belong; to ask, levy, recover and receive the same, and pay the debts in which the deceased stood bound, so far as the goods, chattels, rights, credits, lands, tenements, and hereditaments of said deceased will extend, according to their rate and the order of the law, to make a true and perfect inventory of said goods and chattels, rights and credits, and the same to exhibit in the office of the clerk of this court, at or before the expiration of three months from the date hereof, and to render a just account of the said administration, when thereunto legally required; and the said Cheney Harris is hereby ordained Administratrix of all and singular the goods and chattels, rights and credits of the said deceased.

Witness the Honorable Sam Whitman Jr. Chan-ellor of the 2nd District, this 8th day of April A. D. 1914, and the seal of said court hereunto affixed.

W. R. PISTOLE, *Clerk.*

7

Plea of Defendant.

Filed September 28, 1914. R. L. Harbour, Clerk.

CHENEY HARRIS, Administratrix,

VS.

NEW ORLEANS & NORTH EASTERN R. R. Co.

And the defendant, by its attorney, comes and defends the wrong and injury when etc., and says that it is not guilty of the said supposed grievance above laid to its charge, or any or either of them or any part thereof, in manner and form as the plaintiff hath above complained against it. And of this it puts itself upon the country.

A. S. BOZEMAN,
Attorney for Defendant.

8

Motion of Defendant to Witndraw Plea and Demur to Declaration.

Filed October 7, 1914. R. L. Harbour, Clerk.

CHENEY HARRIS, Ad'm'x,

VS.

NEW ORLEANS & NORTH EASTER- RAILROAD Co.

Comes the defendant and moves the court for leave to withdraw its plea to the declaration and to file the demurrers to said declaration herewith shown the court and filed with this motion.

A. S. BOZEMAN,
Att'y for Defendant.

9 *Order Sustaining Defendant's Motion to Withdraw Plea and Demurrer to Plaintiff's Declaration.*

Filed October 7, 1914. R. L. Harbour, Clerk.

CHENEY HARRIS, Ad'm'x,

VS.

NEW ORLEANS & NORTH EASTERN R. R. Co.

This cause coming on this day to be heard on defendant's motion for leave to withdraw plea and demurrer to declaration of plaintiff filed herein and the same having been heard and considered by the court—sustains said motion, to which the plaintiff excepts.

10 *Defendant's Demurrer to First Count of Plaintiff's Declaration.*

Filed October 7, 1914. R. L. Harbour, Clerk.

CHENEY HARRIS, Ad'm'x,

VS.

NEW ORLEANS & NORTH EASTERN R. R. Co.

Comes the defendant and by leave of the court withdraws its plea to the first count in the plaintiff's declaration and demurs thereto, and prays the judgment of the court if it shall make any further answer thereto and assigns the following causes of demurrer:

1. The said count fails to state a cause of action against this defendant.

2. The said count fails to show that the decedent, Van Harris, left surviving him either widow or children, or parent, or next of kin dependent upon him.

A. S. BOZEMAN,
Attorney for Defendant.

Above demurrer filed also to 3rd. count as amended by inserting the words "and Mother of" in the 2nd line thereof.

A. S. BOZEMAN,
Attorney for Defendant.

11 *Defendant's Demurrer to Second Count of Plaintiff's Declaration.*

Filed October 7, 1914. R. L. Harbour, Clerk.

CHENEY HARRIS, Ad'm'x,

V.

NEW ORLEANS & NORTH EASTERN R. R. Co.

Comes the defendant and by leave of the court withdraws its plea to the second count of the plaintiff's declaration and demurs to the

same and prays the judgment of the court if it shall make any further answer thereto, and for cause of demurrer assigns the following:

1. The said count states no cause of action against this defendant under the act of Congress known as the Employers' Liability Act.
2. The said count states no cause of action against this defendant under the laws of the State of Louisiana.
3. The said count is vague, indefinite and uncertain, and fails to allege facts showing any negligence on the part of the defendant company sufficient to constitute a cause of action against the defendant.

A. S. BOZEMAN,
Attorney for Defendant.

12 *Demurrer to Third Count Filed by the Defendant to Plaintiff's Declaration.*

Filed October 7, 1914. R. L. Harbour, Clerk.

CHENEY HARRIS, Ad'm'x,
vs.

NEW ORLEANS & NORTH EASTERN R. R. Co.

Comes the defendant and by leave of the court withdraws its plea to the third count of the declaration and demurs thereto, and prays the judgment of the court if it shall make any further answer thereto, and for causes of demurrer assigns the following:

1. Said count states no cause of action against this defendant under the act of Congress known as the Employers' Liability Act.
2. Said count fails to show that the deceased Van Harris left surviving him either widow or children, or parent, or next of kin dependent upon him.

A. S. BOZEMAN,
Attorney for Defendant.

13 *Order Overruling Defendant's Demurrer to First, Second, and Third Counts of Plaintiff's Declaration.*

Filed October 7, 1914. R. L. Harbour, Clerk.

CHENEY HARRIS, Admx.,
vs.

NEW ORLEANS & NORTH EASTERN R. R. Co.

This cause coming on this day to be heard on demurrers of the defendant to the first, second, and third counts of plaintiff's declaration filed herein; and the same having been heard and considered by the court—overrules said demurrers, to which action and ruling of the court, the defendant excepts.

14 *Defendant's Affidavit of Meritorious Defense.*

Filed October 7, 1914. R. L. Harbour, Clerk.

CHENEY HARRIS, Admx.,

vs.

NEW ORLEANS & NORTH EASTERN R. R. Co.

A. S. Bozeman, attorney for defendant makes affidavit upon information which he believes to be true, that defendant has a good and substantial defense to this action as follows:

1. That defendant is not guilty of the negligence charged in the declaration or any of it.

2. That deceased assumed the risk.

3. That deceased was injured by reason of his own negligence and the negligence of deceased was the sole and proximate cause of his injury and death.

A. S. BOZEMAN,
Att'y for Defendant.

Sworn to and subscribed before me, October 7th, 1914.

R. L. HARBOUR, *Clerk.*

15 *Plea of Defendant Reriled to Plaintiff's Declaration.*

Filed October 7, 1914. R. L. Harbour, Clerk.

CHENEY HARRIS, Admx.,

vs.

NEW ORLEANS & NORTH EASTERN R. R. Co.

And the defendant, by its attorney, comes and defends the wrong and injury when etc., and says that it is not guilty of the said grievances above laid to its charge, or any or either of them or any part thereof, in manner and form as the plaintiff hath above complained against it. And of this it puts itself upon the country.

A. S. BOZEMAN,
Attorney for Defendant.

Defendant's Further Plea in this Behalf.

And for further plea in this behalf defendant says that the said Van Harris was under no duty to go between the moving cars of the said train for the purpose of coupling the same, or of coupling the air hose, or for any other perpose. And that in going in between the said cars while they were in motion the said Van Harris was guilty of gross contributory negligence, which was the proximate cause of his injury, and death.

And this the defendant is ready to verify.

A. S. BOZEMAN,
Attorney for Defendant.

Issue in short by consent.

FEWELL & CAMERON, *Att'ys.*

Defendant'd Further Plea in this Behalf.

And the defendant, for further plea in this behalf, says that the plaintiff ought not to have and maintain her action against this defendant because it says that the deceased, Van Harris, in going in between the moving cars of the train in question voluntarily exposed himself to the obvious danger and risk of being caught between the said cars and injured or killed, and that in doing so he assumed the risk incident thereto, and that this
16 was the proximate cause of his injury and death, and this the defendant is ready to verify.

A. S. BOZEMAN,
Attorney for Defendant.

Issue in short by consent.

FEWELL & CAMERON, *Att'ys.*

17 STATE OF MISSISSIPPI,
Lauderdale County:

In the Circuit Court, October Term, 1914.

No. 7804.

CHENEY HARRIS (Colored), Administratrix, Plaintiff,
versus.

NEW ORLEANS & NORTHEASTERN R. R. Co., Defendant.

Appearances:

A. S. Bozeman, Counsel for the Defendant.
Fewell & Cameron, Counsel for the Plaintiffs.

Be it remembered, that, on to-wit, the 7th day of October, the same being one of the days of the regular October 1914 term of the Circuit Court of Lauderdale county, Mississippi, this cause came on for hearing before the Honorable John L. Buckley, Judge of said Court, presiding, and a jury having been empaneled, the following among other proceedings were had and entered of record, to-wit:

The Plaintiff, to sustain the allegations of the declaration filed herein, made admissions and introduced evidence as follows, to-wit:

CHENEY HARRIS, (Colored) being first duly sworn, was produced and testified as follows, to-wit:

Direct examination by Mr. Fewell:

Q. Your name Cheney Harris?

A. Yes, sir; my name is Cheney Harris.

Q. Did you have a boy named Van Harris?

A. Yes, sir.

Q. Where is he now Cheney?

A. He is dead.

Q. Where did he work when he was killed?

A. He worked—he was a brakeman on the Northeastern I believe.

Q. Brakeman on the Northeastern?

18 A. Yes, sir; I believe that is where it was.

Q. How old was he approximately Cheney when he died?

A. 25 years old.

Q. What sort of man was he, or boy? Was he abled bodied or weakling or what?

A. No, sir; he was a big, stout, able bodied man.

Q. How long had he worked for the Northeastern Railroad?

A. Well, I can't remember how long he — been there, worked there.

Q. You don't remember?

A. No, sir; I don't remember.

Q. Well, was it several years?

A. It was several years, but I can't remember how many years he — working there.

Q. Where do you live Cheney?

A. I live right down there next to the shop.

Q. In Meridian?

A. In Meridian. Been right here for twenty years.

Q. What do you do?

A. Wash and iron.

Q. Was Van your only boy Cheney?

A. Van was the only one what stayed in the house with me.

Q. Stayed in the house with you?

A. Yes, sir.

Q. Did you see his body after he was killed?

A. Yes, sir; they sent the body to me from New Orleans.

Q. Did you have to make the arrangements for his funeral here?

A. Yes, sir; made the arrangements, me and my son-in-law.

Q. Do you know what the amount of the bill was for that funeral from here?

Mr. Bozeman: We object, if your Honor please, because funeral expenses is not a proper element of damages, therefore incompetent.

19 Which objection was by the Court sustained; to which action and ruling of the Court, the plaintiff then and there excepted.

Q. Did you see your boy after he was dead Cheney?

A. Yes, sir; I seen him.

Q. This body that they shipped up from New Orleans, you say was that the body of Van Harris, your son?

A. Yes, sir; I seen his face and it wasn't soiled nowhere. I could tell him if it wasn't any more than his hand. His hands had mother marks on them, both of them covered over just like a *from*, and he had a scar to the right here.

Q. You saw his face did you?

A. I opened the coffin and run my hand all up in there.

Q. It was Van was it?

A. It was Van, yes, sir, it was Van. His face wasn't disfigured no way.

Q. You say he was 25 years old?

A. Yes, sir.

Q. What if any assistance did Van give you towards support Cheney?

A. Pay my house rent and give me something to eat.

Q. Van's father dead?

A. Yes, sir.

Q. Cheney, do you know how much Van had been making a month with the railroad, about how much.

A. Well, he fed me and seed after me. I didn't have no husband or nothing, and he stayed right in the house with me, all the dependence I had.

Q. Take that chewing gum out of your mouth?

A. All right.

Q. I asked you if you knew about how much Van was making working on the railroad?

A. Yes, sir; sometimes he would make on to \$30.

Q. Sometimes he would make close on to \$30?

20 A. Sometimes he would fetch home \$30, \$40 along there.

Q. \$30 or \$40 a month?

A. Yes, sir; that is what he would do.

Q. He would bring home \$30 or \$40 a month?

A. Yes, sir.

Q. Was he regular in his work Cheney or irregular at work?

A. Yes, sir; he was regular at work. He had his crew.

Q. Do you know who was on his crew, was it Mr. Strobel?

A. Yes, sir; that is the man he was working with, Mr. Stroble.

Q. He was the conductor?

A. Yes, sir.

Q. Did he have any regular engineer that you know of?

A. No, sir; I don't know about any regular engineer.

Q. When did Van leave your alive before his remains were brought back?

A. He left home on Friday, I believe.

Q. What?

A. I believe it was on a Friday.

Q. You think he left home on a Friday?

A. I am just thinking. I don't know. I saw I believe it was a Friday or Thursday one. I believe he left home on Monday, to my remembrance.

Q. How many days after he left before he was killed?

A. Like he went out to-day, to-morrow I got the news he was hurt.

Q. Do you know what railroad he worked for?

A. They said it was the Northeastern was all I know.

Q. When you say it was the Northeastern, do you mean it was the New Orleans and Northeastern Railroad?

A. Yes, sir.

Q. The road that runs from Meridian to New Orleans?

A. Yes, sir.

Q. Do you know whether he was on a through run or local run?

A. That is what he said, he was on a through run.

21 Mr. Bozeman: We object to that and move to exclude it as being hearsay.
Sustained.

Cross-examination by Mr. Bozeman:

Q. You were not with Van when he was hurt Aunt Cheney?

A. No, sir; I wasn't with him.

Q. You were in Meridian at that time were you?

A. Yes, sir.

Q. You say you are his mother?

A. Yes, sir; I am his mother.

Q. How old are you?

A. I am 52 years old.

Q. Did you say that Van was your only child?

A. I say he was the one that was staying with me—no, sir, yonder are my tother two gals.

Q. How many other children have you got besides him?

A. Three others.

Q. Who were they?

A. Oliver Harris, he stays down at Quitman; he wasn't here when he got killed.

Q. I am just asking you his name.

A. Oliver Harris.

Q. Where does he stay?

A. He stays at Quitman.

Q. What does he do?

A. He was firing down there.

Q. For whom?

A. I don't know sir, who the man was.

Q. How old was he?

A. He is 30 years old.

Q. What is the name of the other one?

A. Annie Dunn.

Q. Annie Dunn?

22 A. Yes, sir.

Q. She is married, isn't she?

A. Yes, sir; yonder she is sitting yonder. Yonder is her husband.

Q. Who is her husband?

A. Homer Dunn.

Q. They live here in Meridian?

A. Yes, sir; stays right here in Meridian.

Q. What is the other one's name?

A. Violet Brown.

Q. Is she married too?

A. Yes, sir; she is married.

Q. Where does she live?

A. She stays here on 29th, works here in Meridian.

Q. What is her husband's name?

A. Named John Brown.

Q. Annie and Violet, are they older than Oliver?

A. No, sir; they ain't older than Oliver. Oliver is the oldest child I have got.

Q. They are all grown and married?

A. Yes, sir.

Q. What was Van's father named?

A. Ed Harris.

Q. How long has he been dead?

A. Seven years.

Q. Where did he die?

A. Died right here in Meridian.

Q. Were you ever married to Ed Harris?

A. Yes, sir.

Q. Where were you married to him?

A. Married at Linden Court House in Alabama.

Q. Do you remember what county that was in?

A. Called it Tombigbee, I believe.

23 Q. Linden Court House?

A. Yes, sir; that is what they called it, Tombigbee County.

Q. Do you remember how long ago that was you married?

A. I married thirty-six years before—

Q. Thirty-six years?

A. 36 years ago.

Q. How long have you been living here in Meridian Cheney?

A. I have been living here in Meridian, this makes going on 20 years with this year.

Q. Van you say was 25 years old?

A. Yes, sir.

Q. How much did your house rent amount to?

A. \$7.

Q. Who did you rent from?

A. I rent from a woman named Gertrude Smith.

Q. Colored woman?

A. Yes, sir; Mrs. Wise collects the rent though.

Q. Anybody stay in the house besides you and Van?

A. No, sir; nobody but me and him, and one of my little grand-children.

Q. Whose child?

A. His father died several years ago.

Q. That wasn't Van's child?

A. No, sir; Van couldn't get no children.

Q. Why?

A. No, sir; Van ain't got no children. That was Ed's boy.

Q. Do you know Mollie Harris?

A. Yes, sir.

Q. Wasn't Van married to Mollie Harris?

A. Yes, sir.

Q. Where was he married to her?

A. He married here in Meridian somewhere.

Q. When was that?

24 A. The year after the storm.

Q. Is Mollie here in town now?

A. Yes, sir; Mollie is here over yonder with her cousin.

Q. Over where?

A. On south side of town with her cousin, Ida Preston and them.

Q. She is with Ida Preston, her cousin, here now?

A. Yes, sir; she is.

Q. How long did Van and Mollie live together?

A. Van and Mollie never lived together but six months as I know of. I lived right there with them.

Q. They lived together here in Meridian for six months didn't they?

A. Yes, sir.

Q. Didn't they have a child?

A. No, sir; Mollie had two gals before he married here; a boy and a gal.

Q. Didn't they have a child after they married?

A. No, sir; they didn't stay together long enough.

Q. Didn't you say they stayed together six months?

A. Yes, sir. That little boy she got, he was four months old when she married him.

Q. What is that little boy named.

A. They call him Tommy Jones.

Q. He was Mollie's boy?

A. Yes, sir.

Q. But not Van's?

A. No.

Q. How long did Mollie know Van before he married her?

A. Mollie come over here for the Christmas. Mollie stayed here till March the storm was. Mollie stayed here till the storm was.

Q. You mean the cyclone?

A. Yes, sir. She come over here for the Christmas to stay with her sister Lizzie, and that little gal was so fat I didn't allow my children to play with them.

25 Q. So fat?

A. Yes, sir.

Q. What little girl was so fat?

A. Mollie was so fat; she was so fat I didn't want my little girls to play with them. She was a sot woman to them, and she stayed here till the storm was, and when the storm was Mollie still gets a great big fine gal, and when the storm was Mollie went back to Demopolis to her sister. Mollie was there two months to the day her sister Lizzie got a letter she had a fine boy.

Q. That was after she married Van?

A. No, sir; that was before she married Van.

Q. That is this boy they call Tommy Jones?

A. Yes, sir; Tommy Jones, that little boy.

Q. Van married her after that?

A. Van married her after the storm the next year.

Q. Has Mollie been living in Demopolis ever since then, or do you know?

A. Oh, I don't know sir; she had the boy, she ain't stayed here.

Q. After she had this boy up here at Demopolis, that was soon after the cyclone wasn't it?

A. She got a letter in two months after she went back to Demopolis she had this boy. Lizzie come and told me, she says, Cheney, you know you said Mollie was wrong. I says, Yes. She says, Mollie's got a boy. I says, What I told you? I knowed that was a grown woman.

Q. That was the reason she was so fat?

A. Yes, sir; I knowed that was a grown woman. That is just what I said to her.

Q. You knowed she was a grown woman?

A. Yes, sir; after the baby was four months old, she come back here, and when she come back here she stayed in the house with Eddie Smith, and Van went kindly down there and first

26 I knowed somebody got a license for him, and I didn't know Van was married till he had been married three months. He wasn't old enough to marry nobody.

Q. He was married three months before you knew he was married?

A. Yes, sir.

Q. And during that time he lived with her three months after that?

A. Yes, sir.

Q. During that time they lived here?

A. Yes, sir; Mollie went to Mr. Brown and drawed Van's monty, and this boy got down sick with the small pox and Mollie went over to the mill and drawed Van's money and Mollie left here and left Van sick. I takes Van when he gets so I could wrap his head and carried him to my house, and he stayed there till he got killed.

Q. He never went back to Mollie any more?

A. Never knowed where Mollie was.

Q. You knew where Mollie was?

A. No, sir; she left this town. She didn't come back any more. I didn't know where she was.

Q. About how old would this boy Tommy Jones be now? Were you there the year it was born?

A. No, sir; I wasn't there when it was born.

Q. It was just about the time of the cyclone wasn't it?

A. Yes, sir.

Q. Two or three months after the Cyclone?

A. Yes, sir; it was after.

Q. Isn't it a fact Cheney that Van left this woman, his wife, Mollie Harris and deserted her instead of her going away and leaving Van?

Mr. Fewell: We object to that, if your Honor please; got nothing to do with this case.

The question was withdrawn.

27 Mr. Bozeman: Van never married any body else?

A. No, sir; he never married anybody else.

Q. Do you know whether Mollie ever married anybody else or not?

A. I don't know sir; I hear them say she married.

Q. Don't tell what you don't know?

A. No, sir; I don't know.

Q. Cheney, you all are colored people? Of course we see it, but that may can't write it down there. You all are negroes—

Mr. Fewell: We admit that the dead man is a negro and the people who are going to get what the jury gives them if they give them anything, are negroes.

Mr. Rewell: You say that this woman Mollie left Meridian about the time of the cyclone and went to Demopolis?

A. After the cyclone was over with.

Q. After the cyclone she went to Demopolis?

A. Went to Demopolis.

Q. She didn't have this baby then?

A. No, sir.

Q. She came back here and she had this baby with her did she?

A. Yes, sir.

Q. It was after that that she and Van Married?

A. Yes, sir.

Q. How long after would you say, two or three months, or what?

A. The baby was three or four months old when she fetched the baby over here, and that fall she and Van married.

Q. How long did they live together after that?

A. They never stayed together no longer than six months.

Q. Mollie left Meridian?

A. If she didn't leave Meridian, she wasn't with Van.

Q. She hasn't been living with Van since then.

A. No, sir; she hasn't been living with Van since then.

(Witness excused.)

28 Mr. J. T. DEMENT, being first duly sworn, was produced and testified as follows, to-wit:

Direct examination by Mr. Cameron:

Q. Your name is Mr. John Dement?

A. Yes, sir.

Q. Mr. Dement what business are you engaged in?

A. In the life insurance business.

Q. In the life insurance business?

A. Yes, sir.

Q. Have you with you what is known as the American Mortuary Table?

A. Yes, sir.

Q. Mr. Dement, let me ask you this: the tables that you have with you are the standard tables that are used by all the life insurance companies or not?

A. Yes, sir.

Q. What are those tables based on Mr. Dement?

A. On the expectancy of life.

Q. What class of persons or people are they based on?

A. As I understand the matter under consideration, the American Experienced Table of Mortality. I really don't know how to explain that. The average life of a man I guess is what they are based on according to the different ages.

Q. Does the table itself show what it is based on John?

A. No, sir. All of them are identically the same. All the experienced tables of mortality are the same thing.

Q. Is this table that you have here known as the American Experienced Table of Mortality?

A. Yes, sir.

Q. Is that the table that all life insurance—

A. All of them operate under that same table.

Q. Mr. Dement, look at that table, please sir, and tell us what the expectancy of life would be for a man 25 years of age?

29 Mr. Bozeman: We object to the introduction of these tables or the witness to testify from them, because we say it is incompetent.

The Court: I think you should include in your question Mr. Cameron the man is in good health.

Mr. Cameron: Well, I will ask you Mr. Dement, take a man who is in good health, sound body physically, what his expectancy of life would be as shown by the American Experienced Table of Mortality at the age of 25?

A. 38.81 years.

Q. That is, he would have to live that length of time, 38.81?

A. He is to live 38.81 years according to the Experienced Table of Mortality.

Mr. Bozeman: We move to exclude that.

Which motion was by the Court, overruled; to which action and ruling of the Court the defendant then and there excepted.

Examined by Mr. Bozeman:

Q. Mr. Dement, you yourself know nothing I suppose about how these tables are compiled?

A. No, sir; I do not.

Q. You have never had any experience yourself in compiling them?

A. No, sir.

Q. You have just got a book here with a page printed in it American "Experienced Table of Mortality"?

A. That is published by the Mutual Life Ins. Co. I don't know whether I have the mortality table in this book or not. I have one here published by Wells. I have compared those tables with the different standard publication.

Mr. Bozeman: I move to exclude the testimony of the witness as not being responsive to my question.

The Court: Let it go out.

30 Q. This table that you read from here is a table printed in a book you say issued by the Mutual Benefit Life Insurance Co.?

A. Yes.

Ques. Isn't it a fact that this expectancy of life in this table from which you are testifying is based a good deal, too, on the kind of occupation or life that the man leads with reference to the dangerous occupation and the risk?

A. I don't think so Mr. Bozeman. That is based on the average expectancy.

Q. Of your own knowledge, you don't know how they make it up?

A. No, sir; I do not.

Q. You never had anything to do with making it up?

A. No, sir.

Q. You don't know what they take into consideration when they make it up?

A. No, sir.

Q. You just find it in the book issued by the Life Insurance Company here?

A. Yes, sir.

Q. Isn't it a fact that a man working as brakeman on a freight train is regarded by the life insurance companies and by yourself as a life insurance agent as being in a very hazardous occupation?

A. So much so Mr. Bozeman a great many companies won't write it at all.

Q. Will this Mutual Benefit Life Ins. Co. Write a railroad brakeman?

A. No, sir.

Q. That is by reason of the fact that the ordinary business of a railroad brakeman is so dangerous they are not willing to insure his life?

Mr. Fewell: We object to that.

Q. How long have you been in the life insurance business?

A. Four years.

Q. You have been a life insurance agent four years?

31 A. Yes, sir.

Q. You represent the Mutual Benefit Life Insurance Co. during all that time?

A. No, sir.

Q. What companies have you represented Mr. Dement in that time?

A. The Prudential and the State Mutual of Rome, Ga., and the Missouri State Life and the Mutual Benefit.

Q. They are all standard life insurance companies are they not?

A. Yes, sir.

Q. I will ask you whether any of them write life insurance on railroad brakemen?

A. The Prudential does.

Q. Do any of the others?

A. No, sir.

Q. Does the Prudential write any insurance on colored brakemen, negro brakemen?

A. No, sir.

Q. They do not?

A. No, sir.

Mr. Fewell: We object to that, if the Court please.

Which objection was by the Court, overruled; to which action and ruling of the Court the plaintiff then and there excepted.

Q. Mr. Dement, the fact that this Mortality Table here shows that a man in good health did you say of the age of 25 years that his expectancy of life is 38.81 of a year, that doesn't mean of course that every man 25 years old is going to live 38 years longer?

A. Let me explain that in my language. That table wasn't gotten up expressly for the insurance companies. In other words, they don't class them. They write people of different vocations of life, but taking the entire population that is the average existence of each man.

32 Q. Taking men in all classes and grades of life?

A. Yes, sir.

Q. That is the way you understand it?

A. Yes, sir.

Q. So that a man in a hazardous occupation where his life would be endangered would have a less expectancy than a man in the ordinary, non-dangerous life, but you get at this by averaging the two?

Q. They just simply refuse to write railroad men in those companies, all of those companies.

(Witness excused.)

DENNIS THOMAS, (Colored), being first duly sworn, was produced and testified as follows, to-wit:

Direct examination by Mr. Fewell:

Q. Your name Dennis Thomas?

A. Yes, sir.

Q. Speak out so all of us can hear you distinctly?

A. Yes, sir.

Q. Did you know Van Harris in his life time?

A. Yes, sir.

Q. How long had you known him Dennis, before his death?

A. About two days, I got acquainted with him.

Q. Did you meet him on the day that he was killed?

A. No, sir; on the next day before he got killed.

Q. You mean you met him the day before he was killed?

A. Yes, sir.

Q. Were you with him the day he was killed?

A. Yes, sir.

Q. Where did you get with him Dennie?

A. On Press & Errquart at the railroad office.

Q. What was Van doing when you got with him?

33 A. He was on the front of the engine bringing her out, lining up switches.

Q. Who was the engineer and fireman, do you know their names?

A. I don't know anybody but the engineer, Mr. Fred.

Q. Mr. Fred Stroble?

A. Yes, sir.

Q. You say Van was on the front of the engine living up the switches?

A. Yes, sir.

Q. Did you ride down to the train on the engine?

A. Yes, sir.

Mr. Bozeman: We object to his leading questions.

Q. Were you present when the engine was coupled to the train Dennis?

A. How is that?

Q. Were you there when the engine was coupled to the train?

A. Yes, sir.

Q. How far did you and Van ride the engine from where you first got on it up to the time you got off?

A. Well, as near as I think about it, nearly about a mile to the north end of the yard.

Q. What was going to be done with the engine?

A. Going to couple up to the cars to the train.

Q. To the train?

A. Yes, sir.

Q. Where was the train Dennis?

A. It was at the north end of the yard where they were fixing to couple up at, in the north end of the yard.

Q. In the north end of the yard?

A. Yes, sir.

Q. Was that in New Orleans?

A. Yes, sir.

Q. Do you know what train it was?

34 A. They called it 40, through freight.

Q. Called it 40?

A. Yes, sir; 40.

Q. Do you know what railroad it was the train was to come on?

A. Yes, sir.

Q. What road was it?

A. N. O. & N. E.

Q. You mean the New Orleans and Northeastern when you say N. O. & N. E.?

A. Yes, sir.

Q. You say you didn't know the fireman?

A. No, sir.

Q. Was he a white man or colored man?

A. Colored fellow.

Q. Who was running the engine at the time you and Van were riding down to the train?

A. Fred.

Q. Mr. Fred?

A. Yes, sir.

Q. Which side of the engine were you riding on, on the engineer's side or fireman's side?

S. I was on the fireman's side till we got to the north end of the yard.

Q. Where was Van?

A. He was in front of the engine.

Q. Was he right in front or on the engineer's side or fireman's side?

A. On the engineer's side.

Q. When this engine bot down to where they were to couple on to this train what became of you?

A. I got off at the end of the cars where they were going to couple up at.

Q. What did you do?

A. I walked off to the next side track and stands up there.

35 Q. Approximately how far from there?

A. About thirty feet.

Q. Who was giving the engineer or fireman the signals about coupling up the trains?

A. Van.

Q. Do you know what position he occupied on the train?

A. Brakeman.

Q. Was he on the same side of the track with you or on the opposite side when giving signals to Mr. Fred?

A. He was on the opposite side.

Q. Opposite side from you?

A. Yes, sir.

Q. Could you see him?

A. Yes, sir.

Q. Did you see him when the cars came together?

A. Yes, sir.

Q. What if any signal did he give to Mr. Fred then?

A. Not any of my knowing; I didn't see any.

Q. What signals was he giving to the engineer as the engineer came back towards the car?

A. He was going like that till they hit. (Showing). When they hit, he gets down.

Q. When they het did the engine and cars stop?

A. Yes, sir.

Q. Then what did Van do?

A. He steps in to make—to couple his air.

Q. Stepped in where Dennis?

A. Stepped in between the engine and the car, stepped in in this position, had on hand on his air like that, and the engine

come back and hit him right there and knocked him straddle of the rail.

Q. Which rail was that, the rail towards you or away from you?

A. The rail on the right hand side coming north.

36 Q. That was on the engineer's side?

A. Yes, sir.

Q. Now Dennis, let's assume that that book next to the jury is the engine?

A. Yes, sir.

Q. And this book next to the stenographer is the first car in the train?

A. We will take that for the tender.

Q. This is the engine and tender together?

A. All right.

Q. This is the first car in the train.

A. Yes, sir.

Q. The engine was headed towards Meridian?

A. Yes, sir.

Q. Which side of the track were you on?

A. On your side.

Q. On the left hand side of the track?

A. Yes, sir.

Q. Which side of the track was it you stated a while ago you saw the brakeman flagging Mr. Fred back?

A. I was on your side.

Q. Over here on this side?

A. I was on your side.

Q. Which side was Van on?

A. He was on the tender.

Q. You mean he was riding the tender down?

A. Yes, sir.

Q. What sort of motion was he making with his hand?

A. That way.

Q. Did the engine and the car get together?

A. Yes, sir; coupled.

Q. And coupled?

A. Then he gets down.

37 Q. Now Van is still over here?

A. Yes, sir; he is right in between there now.

Q. When the engine and cars coupled were the engine and cars still moving then?

A. No, sir.

Q. What were they doing? Were they still?

A. Still.

Q. What did Van do?

A. He stepped in between there to couple his air.

Q. The coupling between the tank or engine and the box car leaves the end of the tank and end of the car a little distance apart, doesn't it?

A. Yes, sir.

Mr. Bozeman: Objected to that as leading.

Mr. Fewell: I am going to confess that my friend's objection is correct.

Q. In there any distance between the rear end of an engine tank and the front end of a car to which it is coupled, is there any distance in there?

A. Yes, sir.

Mr. Bozeman: I move to exclude that question and answer, because he should confine his testimony to this particular engine and car here in controversy?

Mr. Fewell: Let it go out Mr. Stenographer.

Q. You saw this engine and the train on the occasion on which Van was killed?

A. Yes, sir.

Q. Was there any distance between the tank of that engine and the front end of the front car on that train when they stopped?

A. Yes, sir.

Q. What fills if anything, that distance?

A. The draw head.

Q. The draw head runs from what?

38 A. Runs from the tender to the car.

Q. Did you say the draw head runs from the tender to the car?

A. Yes, sir.

Q. What did Van undertake to do when the train stopped?

A. Stepped in there to make a coupling.

Q. Stepped in where Dennis?

A. Stepped in between the engine and the car to couple his air.

Q. To couple his air?

A. Yes, sir.

Q. Did he stay on that same side or what?

A. He stayed on this side.

Q. He stayed over on the engineer's side?

A. Yes, sir.

Q. How did he have to get in between the engine and car?

A. In this position; stepped in there in this position, one over there and one here, and he went to catch them.

Q. What position would that put him with reference to the draw bars?

A. That put him facing north.

Q. Put his face north?

A. His side, see—this way.

Q. Put his right side north?

Q. Yes, sir.

Q. Where would he be with reference to the couplers?

A. He would be straddle the rail.

Q. Straddle the right hand rail?

A. Yes, sir.

Q. Now while Van was in this position and I believe you state

that he had hold of one air hose by one hand and the other air hose by the other hand?

A. Yes, sir.

Q. Was he in a stooping position or not?

39 A. Stooping position.

Q. Then what happened?

A. The engine backed up and that bolt hit him here.

Q. Bolt, on what?

A. The tender.

Q. Described that bolt to the jury?

A. There is a big bolt on the tender, on the rear about a four inch bolt right on the tender, and that hit him in the back of the head when it backed up and that throwed him straddle of the rail and the engine run up his leg and stopped, right across his hand here.

Q. While Van was down in this position as you say undertaking to couple the air hose was there anybody giving the engineer any signal at all?

A. No, sir; but that I know of.

Q. Did you see anybody giving any signal?

A. No, sir.

Q. Was Van giving it?

A. No, sir; not that I saw.

Q. Was there anybody giving signals except Van that you saw?

A. No, sir.

Q. Did Van have his face towards the engine or side-ways?

A. Side-ways.

Q. Dennis, do you know approximately how high from the rail an ordinary box car is?

A. To my recollection is about two feet and a half high.

Q. About two feet and a half?

A. To my recollection.

Q. Do you know how high from the rail the rear end of this particular engine was?

A. No, sir; I don't know particularly.

Q. This bolt you speak of what was the size of the bolt approximately?

40 A. About four inches.

Q. You mean four inches how?

A. Four inches all the way around.

Q. Four inches square.

A. Yes, sir; it is a square bolt.

Q. It is four inches?

A. Four inches.

Q. Each side?

A. Each way.

Q. Was there anything on the end of that square tap?

A. Bolt about that far out.

Q. About that far out of the tap?

A. Yes, sir.

Q. While he was in this position what happened?

A. That bolt hit him, the engine backed up and the bolt hit him.

Q. The engine backed up and the bolt hit him?

A. Yes, sir.

Q. Where did the bolt hit him?

A. Up here in the head right up there.

Q. Where did that knock him?

A. Straddle of the rail.

Q. Which rail?

A. Right hand going north.

Q. Was he still facing the engine when he was knocked straddle the rail?

A. He wasn't exactly facing it; he was kindly side—when it hit him that throwed his head south.

Q. Did the train stop then?

A. Yes, sir.

Q. Where were the wheels of the engine or tank when the train was finally stopped?

A. The first wheel on the tender way laying across his hand and his breast right there.

41 Q. Was that the wheel of the tender that was next to the cars?

A. Yes, sir.

Q. This wheel of the tender was across his breast you say?

A. Yes, sir.

Q. Was that above or below the navel?

A. Right along here, exactly along even with the navel.

Q. How was that wheel on him?

A. It was laying right long up in here. It run, you see, right along up in here. He had his hand across that way, and it stopped right there.

Q. What did it do it anything to the leg?

A. It just burst the leg right wide open?

Q. Which leg was that?

A. Left leg.

Q. You say it busted the leg wide open?

A. Busted it wide open.

Q. What was done then, Dennis, if anything, towards getting the engine off of this man?

A. When I backed and caught him the engineer had got out of his engine and walked angled all the way over there near the side-track towards where I was.

Q. You mean he had gotten out on the fireman's side of the engine?

A. Yes, sir.

Q. And had gone angling towards you?

A. Yes, sir.

Q. What attracted his attention to the man under the engine?

A. I hollered at them that they caught a man there.

Q. Was there anybody else hollering?

A. Yes, sir; there were some boys over there on the camp cars.

Q. On the same side of the track you were or on the opposite side?

A. On the opposite side?

Q. Was there anybody near him?

42 A. The fireman was near him.

Q. What was he doing?

A. He was standing up like that looking at him with the oil can in his hand.

Q. What did the engineer do then after that?

A. The yard-master or knocker, whatever he was, he run down there and uncoupled and told him to pull off of him.

Q. How long did Van live?

A. About three minutes.

Q. Was he dead or alive when they pulled the tender off of him?

A. He was alive.

Q. Did the engineer or fireman pull this engine off of him?

A. The engineer.

Q. Do you know anything about the oiling of an engine or locomotive?

A. No more than what I saw that once.

Q. What is necessary to run an engine in the way of oiling it?

A. Oil the driver.

Q. Do you know anything about what is known as an engine getting on the center?

A. No, sir.

Q. You didn't know Van but two or three days?

A. That is all I knowed him.

Q. What sort of man did he appear to be Dennis?

A. Stout, chunky fellow.

Q. Well, what was his appearance with reference to the condition of his health?

A. Oh, he had good health from the looks of him.

Q. From the looks of him?

A. Yes, sir.

Q. Was there anybody else around there that saw the accident that you could see?

A. No more than the fireman.

43 Q. The fireman was where?

A. He was on the opposite side.

Q. When the second move of the engine was made?

A. Yes, sir.

Q. Do you know which way the fireman was looking Dennis?

A. No, sir; I don't -now which way he was looking.

Q. At the time this second move of the engine was made, do you know where the engineer was?

A. Yes, sir.

Q. Where was he?

A. In the engine.

Q. Was he the one that was operating the engine or the fireman?

A. Engineer.

Q. When they got this engine off of Van Harris, do you know what became of Van?

A. He laid down there till the switch engine come with a box car and they picked him up and put him in it.

Q. And they took him up town?

A. Toop him up to Press and Errquart for the ambulance to come and get him.

Q. Do you know whether or not he died?

A. He was dying when the ambulance got there.

Q. Did you go up there where the ambulance was?

A. I stayed with him from the time he got hurt up to the time he died.

Q. Do you know whether or not Van suffered to amount to anything before his death?

A. He didn't do anything but groan once; that was before we picked him up, just groaned once.

Q. Where did he die Dennis?

A. Died on Press and Errguart, right on the corner, in the box car.

44 Q. In the box car?

A. Yes, sir.

Q. Did they have a doctor with him when he died?

A. No, sir; when the students come with the ambulance they said they couldn't take him, he was dying. The patrol come to take him and the dead wagon come and got him.

Q. Do you know what became of his body?

A. They took it on the what they called the morgue then.

Q. Dennis, there is what is called an air hose that couples up between cars and between the engines and cars, what are they? Describe those to the jury if you can?

A. The air hose is for stopping, to stop a train when you go down a hill or something.

Q. Describe the thing you call an air hose?

A. They are long, about four feet long, round hose about that big around.

Q. Do they fasten on to the car?

A. Yes, sir; they have got fastenings; one fastens on to the engine and one fastens on to the car.

Q. When they are not in use how near do they come to touching the ground?

A. Well, about that distance.

Q. You say they are made of rubber, or did you say so?

A. Rubber.

Q. What if anything is on the end of these air hose?

A. Iron on it.

Q. Was there anything between you and Van Harris while Van was in the endeavor to couple these air hose?

A. No more than a draw head.

Q. Well now, these air hose that you have described were those the kind of things that Van was trying to couple up?

A. Yes, sir.

Q. Dennis, when this engine was started the second time and after the coupling had been made was there any signal given by the engine or any bell rung or anything of that kind?

45 A. No, sir; if they did I never seen it.

Q. Did you hear anything?

A. No, sir.

Q. Where do you live Dennis?

A. St. Ferdinand Street.

Q. In what city and state?

A. New Orleans.

Q. State of Louisiana?

A. Yes, sir.

Q. What is your business?

A. Working steamers.

Q. On steamers?

A. Yes, sir. Loading vessels.

Q. Have you got any interest in this suit at all?

A. Not at all.

Cross-examination by Mr. Bozeman:

Q. What number do you live at on Saint Ferdinand Street?

A. #1430.

Q. You say you had only known Van two days before his death?

A. Yes, sir.

Q. You say you met him the day before he died?

A. Yes, sir.

Q. Was that the first time you ever met him?

A. Yes, sir.

A. Met him right there on Press and Errquart.

Q. Where did you meet him?

Q. That is in the railroad yards?

A. No, sir; that is in the coal yards.

Q. How long were you with him that day?

A. About four hours.

Q. That was—what time of day was that?

A. That was one o'clock I was with him.

Q. One o'clock in the day time?

46 A. Yes, sir.

Q. And you stayed with him from one o'clock to about four o'clock in the evening?

A. Yes, sir.

Q. There at the same place?

A. Yes, sir.

Q. When did you next see Van?

Q. That was when he was coming out on his engine.

Q. That was the next day was it?

A. That was the day I was with him.

A. But you said you met him the day before he died and stayed with him from one o'clock to four o'clock that evening?

A. Yes, sir.

Q. That was the day before he died wasn't it?

A. Yes, sir.

Q. When did you meet him the day he was killed?

A. That was when he was coming out on his engine.

Q. Where did you meet him?

A. About half past three.

Q. Whereabouts?

A. On Press and Moray.

Q. You met him on the day of his injury about half past three?

A. Yes, sir; he was going up to the round house to get his engine.

Q. Did you stay with him there till he got ready to go to get his engine?

A. No, sir; I come to Press and Errguarter till the engine come by.

Q. You didn't go to the round house with him?

A. No, sir.

Q. When was it the engine come from the round house?

A. About 4:55.

Q. That is about 5 minutes to 5 o'clock was it?

47 A. Yes, sir.

Q. Why do you put it about 4:55?

A. Well, it was about along that time.

Q. Who was on the engine when it come there before you got on it?

A. Mr. Fred, the engineer, and Van.

Q. That all?

A. That is all I saw.

Q. You didn't see anybody except the engineer and Van?

A. That is all.

Q. Who was the engineer?

A. Mr. Fred Strouble.

Q. How long have you known him?

A. Ever since I was a little boy.

Q. Did you ever work for the railroad?

A. No, sir.

Q. Did you ever live here in Meridian?

A. No, sir.

Q. No, sir.

Q. Have you always lived in New Orleans?

A. No, sir.

Q. Where did you first know Mr. Fred Stroble?

A. Right there in New Orleans.

Q. How old are you Dennis?

A. 26 years old.

Q. Where did you say you live?

A. 1420 Saint Ferdinand Street.

Q. How long have you live there?

A. About three years.

Q. Are you a man of family? Are you married?

A. Yes, sir.

Q. Have you a wife and children?

A. Yes, sir.

Q. Do they live there at 1420 with you?

A. No, sir.

48 Q. Where do they live?

A. Across the lake; my wife died.

Q. When did she die?

A. Died in January.

Q. January of this year?

A. Yes, sir.

Q. That before Van was killed?

A. Yes, sir.

Q. Where was your family living, your children and all when Van was killed?

A. In New Orleans.

Q. This same place, 1420?

A. Yes, sir.

Q. You were living there?

A. Yes, sir.

Q. You and your children?

A. Yes, sir.

Q. What did you say your business was?

A. Loading vessels.

Q. Who are you working for now Dennis?

A. I Isn't working for anybody.

Q. Where did you come from when you come here to testify in this case?

A. New Orleans.

Q. Were you not working for any body in New Orleans?

A. No, sir.

Q. Have you got any job?

A. No, sir; just catching jobs.

Q. How long since you have worked for any body regularly?

A. About two weeks ago.

Q. Who did you work for then?

A. Mr. Jenkins.

Q. Who is Mr. Jenkins.

A. On the Basin; got a sand yard, brick yard.

49 Q. What Mr. Jenkins is that?

A. Mr. Jenkins all I know.

Q. What are his initials?

A. I don't know sir.

Q. He got a sand yard?

A. Yes, sir; and brick yard.

Q. What did you do for him?

A. Loading barges.

Q. How long did you work for him?

A. About four weeks.

Q. Who did you work for before that?

A. Mr. Ladner.

Q. Whereabouts?

A. In Gulfport.

Q. How long?

A. About three years.

Q. You worked for Mr. Ladner there in Gulfport about three years?

A. Yes, sir.

Q. Straight along?

A. No, sir; he don't have work that regular.

Q. Were you working for him in January of this year, 1914?

A. No, sir.

Q. How come you in New Orleans, if you were working for Mr. Ladner in Gulfport when this accident happened?

A. I was down in New Orleans to see my mother.

Q. Where did your mother live?

A. Lived on St. Ferdinand Street.

Q. At this number you gave?

A. Yes, sir.

Q. How long had you been in New Orleans then?

A. Been there about three weeks.

Q. Had you been going anything during that time?

50 A. No, sir.

Q. No work?

A. No, sir.

Q. Dennis, who did you first tell about knowing anything about this accident?

A. Who did I first tell?

Q. Yes?

A. A fellow called Johnny Ray; Johnny Jones is his right name.

Q. Who was Johnny Jones?

A. Colored fellow.

Q. Where does he live?

A. He lives in New Orleans.

Q. What does he do?

A. He used to run on the railroad.

Q. On the New Orleans & Northeastern Railroad?

A. Yes, sir.

Q. Johnny Ray?

A. Johnny Jones.

Q. What was he, a fireman or what?

A. A brakeman.

Q. Where was it you told him about it?

A. After we brought Van Bank up in the car and while we were there.

Q. While Van was still in the car?

A. Yes, sir.

Q. Johnny Jones come up there where you were?

A. Yes, sir.

Q. And you told him about it?

A. He asked me how did it happen and I just told him.

Q. Did you come here from Gulfport or from New Orleans?

A. From New Orleans.

A. Dennis, where were you going on this day when you rode up on this engine?

51 A. Well, he told me to come and go out there with him, he had some clothes to send back.

Q. Had some what?

A. Had some clothes and he wanted to send a list back to Mr. Maleuse for to wash.

Q. Wanted to send some clothes to wash?

A. Yes, sir; and he gave me a list.

Q. That is when you come out there to couple on to this train in the north yard?

A. Yes, sir.

Q. Did Van live out there?

A. No, sir.

Q. Were the clothes out there?

A. No, sir; he had some clothes in the tool box, I think he said.

Q. Some clothes in the tool box?

A. Yes, sir; in the engine.

Q. The engine was down there at Press Street, wasn't it? Why didn't he give it to you there where he was?

A. He didn't have time; he was lining up switches.

Q. You were there before the engine started out weren't you?

A. I got on it when the engine was going out.

Q. But you had been there sometime before that hadn't you, with him?

A. I hadn't been to the round house with him.

Q. You were closer to the round house there than you were up at the other place, weren't you?

A. No, sir.

Q. Did you go with him to the round house?

A. No, sir.

Q. You didn't go to the round house?

A. No, sir.

Q. You waited there at Press Street till the engine came by there did you?

52 A. Yes, sir.

Q. How were you drest that day Dennis?

A. I had on a pair of blue pants.

Q. What kind of coat did you have on?

A. I didn't have on any coat.

Q. Were you in your shirt sleeves?

A. No, sir; I had on a jumper.

Q. A blue jumper?

A. Yes, sir.

Q. You had on a blue jumper and a blue pants?

A. Yes, sir.

Q. When you speak of blue pants, you have got on blue pants now, haven't you Dennis?

A. Yes, sir; a pair of pants something like these.

Q. You had on a pair of pants something like you have got on now?

A. Yes, sir.

Q. That was a dark blue wool pair of pants?

- A. Yes, sir.
- Q. Your jumper was a light blue over-all jumper?
- A. Yes, sir.
- Q. But you didn't have on the over-all pants?
- A. No, sir.
- Q. You had on the dark blue wool pants?
- A. Yes, sir.
- Q. You say you got on at Press Street and rode to the place of the accident?
- A. Yes, sir.
- Q. What part of the engine did you ride out?
- A. On the tender.
- Q. What part of the tender? Did you ride up in the tender?
- A. No, sir; on the hind end of the tender.
- Q. What is there back there for you to ride on?
- A. Steps.
- 53 Q. Which side of the tender were you riding?
- A. I was riding on the left hand side.
- Q. You were riding on the left hand side?
- A. Yes, sir.
- Q. The hind end of the tender?
- A. Yes, sir.
- Q. That is on the fireman's side, isn't it?
- A. Yes, sir.
- Q. Did the engineer or the fireman either one see you get on that engine?
- A. Yes, sir.
- Q. The engineer, Mr. Fred, saw you?
- A. The fireman saw me, he couldn't help but see me.
- Q. Do you know whether the engineer saw you or not?
- A. He seen me when I got out there at Claiborne and the switch engine had them blocked.
- Q. When you got where?
- A. Clairborne.
- Q. Clairborne Street?
- A. Yes, sir.
- Q. The engine stopped there?
- A. Yes, sir; stopped right on the bridge.
- Q. What was the reason they stopped there?
- A. The switch engine had them blocked with some cars.
- Q. How long did they stay there?
- A. About 5 minutes.
- Q. You say the engineer saw you there?
- A. Yes, sir.
- Q. What was the occasion of him seeing you?
- A. He got down to oil up, or something.
- Q. Got down to oil up?
- A. He got down with the oil tank.
- Q. Were you still on the tender?
- A. No, sir.
- 54 Q. Where were you then?

A. I got down on the ground.

Q. Stayed back in the back end of the engine?

A. Yes, sir.

Q. Did he come around your way?

A. No, sir.

Q. Did he say anything to you?

A. No, sir.

Q. What did they do there if anything besides oil the engine?

A. Nothint at all.

Q. Did you see Van there?

A. No, sir; he had hollered and told Van to go on down there and see what was the matter with them fellows, let them get out of the way so he could get by.

Q. So Van went on down the track to see what they were going?

A. Yes, sir.

Q. Do you know what the switch engine was doing?

A. It was at the other end of the yard; no, sir; I don't know.

Q. You said something about the track being blocked, what was it?

A. It was a box car.

Q. Was the switch engine there?

A. No, sir.

Q. Was there any engine hold of the cars moving them?

A. No, sir.

Q. Immediately they stopped there, the engineer sent Van on ahead to see what was the matter didn't he?

A. Yes, sir.

Q. Did the fireman do anything there?

A. No, sir.

Q. Is there any switchman's shanty there, or anything like that, at Claiborne?

A. On further on the other side of Claiborn there is, about 200 yards.

55 Q. Did they go in that shanty for any purpose?

A. No, sir.

Q. No body went in there at all?

A. No, sir.

Q. Did you see Van go in there?

A. No, sir.

Q. He didn't go in there, did he?

A. No, sir.

Q. Did Mr. Fred, the engineer go in there?

A. No, sir.

Q. What did Van have with him on the engine, if anything? Did he have anything in his hands?

A. Yes, sir.

Q. What did he have?

A. Bucket.

Q. What kind of bucket was that?

A. A big, zinc-tin bucket.

Q. Did he carry that all the way with him?

A. Yes, sir.

Q. Did he carry that out with him when he left the engine?

A. Yes, sir.

Q. Which way did he go?

A. Out towards the north end of the yard.

Q. There was nothing attached to that engine was there, just the engine by itself?

A. Just the engine by itself.

Q. When they left Claiborn Street, did you get back up on the tender?

A. Yes, sir.

Q. On the rear of the tender?

A. Yes, sir.

Q. Did you have any talk with Mr. Fred there, the engineer?

A. No, sir.

56 Q. He said nothing to you and you nothing to him?

A. No, sir.

Q. When did Van next get back on the engine?

A. When the engine got up there and moved that crossing.

Q. He didn't come back down to the engine?

A. No, sir.

Q. When the engine got out there to this train it was going to couple on to, which side of the train did it come up on?

A. Which side of the train?

Q. Yes, when the engine come up to where the train was, which side was the train on? On your right hand side or left hand side?

A. On the left hand side.

Q. The engine was headed north wasn't it?

A. Yes, sir.

Q. Coming north?

A. Yes, sir.

Q. And you were riding on the back of the tender?

A. Yes, sir.

Q. Where was it that you got off?

A. Got off when they got to the train.

Q. Did you wait for the engine to stop before you got off?

A. No, sir.

Q. Did you get off near the end of the train?

A. Got off right at the end of the train.

Q. Right at the end of the train?

A. Yes, sir.

Q. As you stepped off the end of the train, which way was the train from you.

A. It was north.

Q. You were going north weren't you?

A. Yes, sir.

57 Q. As you were looking north now, and you stepped off near the end of the train was the train on your left hand side or right hand side?

A. On my left hand side.

Q. And now far was it from where you stepped off over towards the end of the train?

A. Well, where I stepped off from it was about forth or forty-five feet, and I walked on up to the next side track and stood up in the side track till they backed up.

Q. When you say it is about forty or forty-five feet, you mean it was about 45 feet straight across from one track to the other?

A. From where the train was made up to where I got off.

Q. I still don't understand you. You mean that you got off 45 feet south of the end of the train or it was 45 feet straight across?

A. Straight across.

Q. It was straight across on your left hand side then about 45 feet to the train?

A. Yes, sir.

Q. The engine kept going did it?

A. Yes, sir.

Q. Then where did you go?

A. I come on up to the car, come on up and stood in the middle of the track till the engine backed up to the train.

Q. On the track that the train was on?

A. No, sir.

Q. On which track?

A. On the side track.

Q. You were on the side track when you got off of the engine, weren't you?

A. Not on the side track the train was made up on.

Q. The train was on the track west of you, your left hand side?

A. Yes, sir.

58 Q. And you were on the side track on the east hand side weren't you?

A. No answer.

Q. How many side tracks are there there? Maybe we can get it straight that way.

A. As near as I can get at it, it is about six.

Q. All right. Here were the sic tracks you say there, this end shows north and this "S" here shows south?

A. Yes, sir.

Q. Which one of these tracks did the engine come up on?

A. The engine come up on this track.

Q. That is the west track here? I will put an E right there to show, that is the track the engine come up on?

A. Yes, sir.

Q. Which track was the train standing on?

A. The train was standing like way over here; like, say this was the main line, this was another side track, this a main line, this the side track the train was made up on.

Q. I will put an M there for the main line, like that was the main line?

A. Yes, sir.

Q. The train then was on this track over here?

A. Yes, sir.

Q. I will put a "T" there for that. Now, the engine come up on this west track right here did it?

A. Yes, sir.

Q. Well now, we will mark this place here by this "T" there, we will say the cars were standing there,—is that all right, just for illustration?

A. We will say this is the train made up here.

Q. We will say that is the north end of the train there?

A. Yes, sir.

Q. The engine was on this track? Where was it you got off?

59 A. Say this is the box car, I got off along here.

Q. You got off along here?

A. Yes, sir.

Q. Over on this track. Which way did the engine go?

A. The engine went north.

Q. Where did you go?

A. I walked over on this track here.

Q. Which track?

A. This track.

Q. You walked over on this track?

A. Yes, sir.

Q. Your name is Dennis what?

A. Thomas.

Q. I will put a "D" there for Dennis. You walked over on this track here?

A. Yes, sir.

Q. That left the main line between you and the track the train was on?

A. Yes, sir.

Q. Did you stand here right opposite the end of that train?

A. Right there, I was standing just like you see this line comes down here.

Q. You were right straight across from the end of the train?

A. Yes, sir.

Q. Were there any cars on any of these tracks here?

A. There were cars on this track here, but further back down about two blocks down.

Q. Were there any cars between you and this train over here?

A. No, sir.

Q. Or between you and this track over here?

A. No, sir.

Q. Was there any body standing right here with you?

A. No, sir.

60 Q. Nobody at all?

A. No, sir.

Q. You just stood there did you?

A. Yes, sir.

Q. It was day time was it?

A. Yes, sir.

Q. Where did this engine go when you got down off of it?

A. It went down for to come up in this track here.

Q. Did it back down in this track?

A. Yes, sir.

Q. Did Van go with the engine?

A. Yes, sir.

Q. Van went with the engine?

A. Yes, sir.

Q. Did he come back with the engine?

A. Yes, sir; he got on the tail-end of the tender and come on down.

Q. Did you see him when he got on the tail-end of the tender?

A. Yes, sir.

Q. What was he on?

A. On the steps.

Q. On which side?

A. On the right hand side.

Q. That is on the engineer's side?

A. Yes, sir.

Q. On the side opposite from where you were?

A. Yes, sir.

Q. On the right hand side?

A. Yes, sir.

Q. Did Van have anything in his hands while he was riding on the rear end of the train on the steps when the engine was backing down there?

A. No, sir.

61 Q. He did not?

A. No, sir.

Q. Did you see the fireman on the engine while he was backing down before the accident?

A. Yes, sir.

Q. Where was he?

A. He was on his side.

Q. Sitting in his seat?

A. No, sir.

Q. Whereabouts?

A. Standing in the Gang-way.

Q. The gang-way is the space between the cab of the engine and the tender isn't it?

A. Yes, sir.

Q. What was he doing?

A. Wiping oil off his hands when I saw him.

Q. Wiping oil off of what?

A. Off his hands.

Q. Did you see the engineer, Mr. Fred?

A. Yes, sir.

Q. What was he doing?

A. Standing up on the platform in the engine.

Q. Was he running the engine?

A. Yes, sir.

Q. Was he standing up or sitting in his seat?

A. He was standing up.

Q. Wasn't he sitting on his seat with his foot out the window?

A. No, sir.

Q. What was Van doing as they approached this string of cars they were going to couple to?

A. He was on the tail-end.

Q. Was he giving any signs or signals with his hand?

62 A. Yes, sir.

Q. While he was on the tender?

A. While he was on the tender.

Q. What sort of signal was he giving?

A. That way (indicating).

Q. Waving his hand?

A. Yes, sir.

Q. Waving his hand back the way the engine was moving?

A. Yes, sir.

Q. Did he get off of the tender before the engine got to the string of cars?

A. No, sir; he stayed on till it hit.

Q. He stayed on the tender till it hit?

A. Yes, sir.

Q. Stayed on the steps back there?

A. Yes, sir.

Q. That step is on the back end of the tender, isn't it?

A. Yes, sir.

Q. Now, did you see him do anything at all before the engine hit the cars now in the way of doing any coupling or anything of that kind?

A. No more than step up there and couple his air, that is all I seen him do.

Q. I am speaking before the engine hit the first time, you say he was still riding on the tender when the engine hit?

A. Yes, sir.

Q. Where was that step—Suppose this is the engine, where was that step he was standing on?

A. That step leads like from here down.

Q. On the side?

A. On the side.

Q. Not on the end?

A. It was on the end, but on the side.

63 Q. It is near the end but it is on the side?

A. Yes, sir.

Q. When he was standing on that step would he be hanging out the side of the tender, or would he be hanging out back of the tender this way?

A. Side of the tender.

Q. Standing right side of the tender?

A. Yes, sir.

Q. Then he was on the opposite side of the tender from you, you were standing over there towards where the jury was, weren't you? Suppose this is the right of the engine and this is the back of the

engine and this is the train down this way, and you were backing down this way, Van was over here where the Stenographer is, wasn't he?

A. Yes, sir.

Q. Over on this side?

A. Yes, sir.

Q. And that put the back of the tender between you and him didn't it?

A. Yes, sir.

Q. Will you explain to the jury how you could see him waving his hand to the engineer or signal to the engineer if you were standing on that side of the engine and he was over here?

A. Yes, sir.

Q. How?

A. You could see him. He had his feet up on one of the tender—had his right arm hooked in the hand-hold and had one foot up here doing like that.

Q. Was he facing back this way, the way the engine was moving?

A. He was facing south.

Q. He was facing south?

A. Yes, sir.

64 Q. And the engine was backing south?

A. Yes, sir.

Q. And he had his right hand hooked in what?

A. The hand-hold where you catch.

Q. Had his arm hooked in there?

A. Yes, sir.

Q. And that threw him outside of the engine did it?

A. Yes, sir.

Q. And his back to the engine?

A. Yes, sir.

Q. Which hand was he motioning with?

A. His left hand.

Q. He didn't get down off the side of the tender till the engine struck?

A. No, sir.

Q. Did you see him doing anything when he was making that coupling in there? I am not talking about the air hose but the coupling, you know what that is, don't you?

A. Yes, sir.

Q. Where the draw Bars are?

A. Yes, sir.

Q. Did you see him doing anything in making that Coupling?

A. No, sir.

Q. When the engine came back up and up to the time it hit the cars, Van hadn't done anything at all fooling with the couplers?

A. No, sir.

Q. Had the engine stopped entirely before he got off the train?

A. Yes, sir.

Q. The engine stopped?

A. Yes, sir.

Q. Ain't it a fact Dennis before the engine got to this string of cars that Van got down off of the tender and back down there

65 to the cars between the engine and the lower end, that a fact?

A. No, sir.

Q. It is not?

A. He did not do that.

Q. Answer out loud so the Stenographer can get it?

A. He did not do that.

Q. He stayed up on the engine till the engine struck the cars?

A. Yes, sir.

Q. Then they all come to a stop?

A. Yes, sir.

Q. The engine stopped?

A. Yes, sir.

Q. The tender stopped?

A. Yes, sir.

Q. The cars were not moving?

A. No, sir.

Q. All to a dead stop?

A. Dead stop.

Q. And then Van got down off the tender?

A. Off the tender.

Q. He didn't get down off the tender till it did stop?

A. No, sir.

Q. Where were you standing then?

A. I was still standing in the same place I was.

Q. You never had moved at all?

A. No, sir.

Q. Just standing out there in the open?

A. Yes, sir.

Q. You were not standing behind any car?

A. No, sir.

Q. There was nothing to keep the engineer or fireman or anybody else from seeing you were there?

66 A. You see the engineer, on his side where he was, he couldn't see me.

Q. The fireman could have seen you?

A. Yes, sir.

Q. If the engineer had come over on the fireman's side he could have seen you?

A. Yes, sir.

Q. How long was the engine and train of cars stopped there before Van went in between them?

A. How long was it stopped there?

Q. Yes, how long after everything came to a stop before Van went in between them?

A. He got right on down as soon as they hit a stop, he steps down and gets in there.

Q. Tell me what he did again. You were standing on the left hand side of the train were you?

A. Yes, sir.

Q. And Van was over on the opposite side from you?

A. Yes, sir.

Q. What was it he did?

A. He gets there when the train hit and stopped, he gets up there to couple his air up.

Q. Just tell the jury what he did?

A. He gets in there and catches hold to couple it and the trains backs up.

Q. The air hose was hanging down below the cars, wasn't it?

A. Yes, sir.

Q. One on the engine side, one attached to the engine?

A. Yes, sir.

Q. And one attached to the car next to it?

A. Yes, sir.

Q. You say he got in there to attach it up?

67 A. Yes, sir.

Q. Did he get hold of the air hose?

A. Yes, sir; he got hold of the one on the left hand side.

Q. That was the one on the car?

A. Yes, sir.

Q. Did he ever get hold of the air hose on the engine side?

A. Yes, sir.

Q. He got hold of that too?

A. Yes, sir.

Q. Did he ever couple them?

A. No, sir.

Q. He never did couple them?

A. No, sir.

Q. Was he stooping down between the cars to make that coupling?

A. Yes, sir.

Q. That coupling hands right in the middle of the train? Did it or not?

A. In the middle?

Q. Did the air hose hang right down in the middle?

A. No, sir; not to say in the middle; like this is the tender, it hangs on the side like.

Q. We will take the one on the car, the bumper or coupling apparatus is right in the center isn't it?

A. Yes, sir.

Q. By the way, what kind of car was this? Was it a box car or flat car?

A. It was a box car.

Q. Where did the air hose hang with reference to this coupler on the car?

A. It hangs more on the other side.

Q. On the left side?

A. On the bumper.

68 Q. Where did the air hose on the engine hang?

A. It was on the right hand side.

Q. It was on the right hand side?

A. Yes, sir.

Q. Opposite side?

A. Yes, sir.

Q. Van—did he catch the air hose on the car with his left hand?

A. Yes, sir.

Q. And he caught the air hose on the engine with his right hand?

A. Yes, sir.

Q. How was he standing?

A. He was standing in this position, with one *feet* straddle of the rail and the other one above the bumper.

A. When you say one foot straddle the rail, you mean one on the outside of the rail?

A. Yes, sir; one on the outside and one on the inside.

Q. Which one was on the outside?

A. His left foot was on the inside and his right one was on the outside.

Q. Which way was he facing?

A. Kindly northeast like.

Q. Was he facing the engine or car?

A. He wasn't exactly facing the car, neither the engine.

Q. Was he looking straight through?

A. He was looking kindly angling like.

A. Angling which way?

A. North, like.

Q. When he got hold of these couplers, did he give any signal to the engineer?

A. No, sir.

69 Q. What was it moved?

A. The engine.

Q. Was it the cars or engine?

A. The engine.

Q. The cars had already coupled together hadn't they?

A. Yes, sir.

Q. The engine was right jam up against the cars?

A. Yes, sir; they had coupled.

Q. They had actually coupled together?

A. Yes, sir.

Q. The engine moved back?

A. Yes, sir.

Q. You say Van hadn't got the coupling made?

A. No, sir.

Q. He still had them in his hand?

A. Yes, sir.

Q. What was it that hurt him?

A. There was a Big bolt off of that piece of iron that screws up there that holds that piece of iron to the bumper, there was a big bolt there.

Q. Where did that hit him?

A. Right along in here.

Q. Did anything hit him on the other side?

A. No, sir; just that bolt hit him and knocked him down.

Q. Didn't mach his head?

A. No, sir.

Q. Didn't catch his head between the engine and something on the car and mash him?

A. No, sir.

Q. Just something on the engine hit him and knocked him over?

A. Yes, sir.

Q. Could you see from where you were the bolt that hit him?

A. Yes, sir.

70 Q. Where is that bolt located on the engine? We will say the end of this table was the back end of the engine?

A. Yes, sir.

Q. How big you say that bolt was?

A. There was a tap on there about four inches square.

Q. Four inches square you say?

A. Yes, sir.

Q. What part of the engine is that on?

A. There is some on both sides?

Q. Which side of it hit him?

A. That was on the right hand side.

Q. Is there more than one on the right hand side?

A. Yes, sir.

Q. About how many?

A. About two of those.

Q. That sticks out on the back end of the engine?

A. Yes, sir.

Q. Which one was it hit him?

A. The last one.

Q. You mean the one on the outside or the one on the inside?

A. The one on the outside.

Q. That is way out here right near the corner of the tank here?

A. No, sir; not so near the corner.

Q. Is it near the bumper?

A. Yes, sir.

Q. Near the bumper?

A. Yes, sir.

Q. How far did that engine move?

A. It moved, I will say, about two feet and half.

Q. Moved about two feet and a half?

A. Yes, sir.

Q. When it struck Van he fell back did he?

A. Yes, sir.

71 Q. With one foot on the outside and one on the inside still of the rail?

A. Yes, sir.

Q. And the wheel caught him on his leg you say?

A. Yes, sir; caught him on his leg.

Q. And run up on his body?

A. Yes, sir.

Q. And he had his hand down there?

A. Yes, sir.

Q. What wheel was that?

A. That was the right hand wheel on the engineer's side.

Q. The right hand wheel, the back wheel of the engine?

A. Yes, sir; the back wheel.

Q. There didn't any wheel go over him entirely did it?

A. No, sir.

Q. Just the first wheel ran part of the way?

A. Yes, sir; and stopped on his thigh here.

Q. When he fell backwards, he threw his feet kindly in front towards the wheel didn't it?

A. No, sir; he didn't throw his foot any way, when the engine hit him, he fell just the same as that book.

Q. How did he fall?

A. He fell right back, with his *had* right on the rail and stayed that way.

Q. And the engine moved about two and a half feet, you say?

A. Yes, sir.

Q. And stopped?

A. Yes, sir.

Q. Did you go over there immediately when you say this man hurt?

A. Not till they pulled off of him.

Q. Not till they pulled off of him?

A. No, sir.

72 Q. Did you keep your stand over there where you were?

A. Yes, sir.

Q. You didn't move off of that?

A. No, sir.

Q. You still stood on this side track where you were?

A. Till they pulled off of him.

Q. This man was your friend, wasn't he?

A. No, sir.

Q. You had gone out there specially with him to do a favor for him, hadn't you?

A. Yes, sir.

Q. You had gone out there to help him?

A. Yes, sir.

Q. You had just gone out there to accommodate him hadn't you?

A. That is all.

Q. You didn't go up there to help pull it off of him?

A. I just stood there after I seen he was hurt.

Q. You didn't go there to help him?

A. There wasn't nothing for me to do.

Q. You just stood there in your place on the side track?

A. Yes, sir.

Q. Didn't you see the engineer there after he was hurt, after he was found there, trying to get somebody to uncouple that engine so he could pull off of him? Didn't you hear him calling for somebody to do that?

A. He got down off his engine when he got on him and walked off about thirty feet.

Q. Didn't you hear him ask somebody and looking for somebody to come there and uncouple that so he could pull that engine away from him?

A. No, sir.

Q. You didn't hear anything of that kind?

A. No, sir.

73 Q. You didn't go up close to where he was till after they had pulled the engine off of him?

A. No, sir.

Q. When this engine moved this 2 and $\frac{1}{2}$ feet and backed over him did Van many any out-cry at all? Did he holler at all, make any noise of any sort?

A. No, sir.

Q. How long was it after the engine backed back this second time and stopped before any body got out of the engine?

A. Before any body got out?

A. Yes. Did they get out immediately?

A. Yes, sir.

Q. Where was the fireman when this engine moved back the last time?

A. He was on the right hand side, with the oil can in his hand.

Q. In the cab still?

A. No, sir; he was on the ground.

Q. Whereabout in the engine was he?

A. On the engine?

Q. You say he was on the right hand side of the engine?

A. On the right hand side of the engine but on the ground.

Q. Was he up on the driving wheels or back there where Van was?

A. No, sir; he was even with the cab.

Q. That was on the side opposite from you?

A. Yes, sir.

Q. Dennis, don't you know you can't stand over here on the left hand side of an engine 30 feet from it there and tell where a man is on the opposite side standing over there?

A. You can stand up here and look like under that table and you can see a man on the other side.

Q. You can stand over there 30 feet on the opposite side of a locomotive on a side track there and tell where that fireman was on the east side of the engine, on the opposite side from you?

74 A. Yes, sir.

Q. You could do that?

A. Yes, sir.

Q. You say the fireman was standing on the ground?

Q. Yes, sir.

Q. And he had the oil can in his hand?

A. Yes, sir.

Q. You could see the oil can?

A. Yes, sir.

Q. You could see the oil can while he was on the other side of the cab there?

A. Yes, sir.

Q. And you were on this other side over here?

A. Yes, sir.

Q. What was he doing with the oil can?

A. He wasn't doing anything.

Q. When did he get out of the engine?

A. He got out before it hit.

Q. Was it still rolling when he got out?

A. Yes, sir.

Q. Still rolling?

A. Yes, sir.

Q. Could you see the engineer when the engine moved back the second time? Could you see him from where you were?

A. No, sir.

Q. You couldn't see him?

A. No, sir.

Q. You don't know what he was doing?

A. No, sir.

Q. When they come up there now, to get Van out, who pulled the train off of him? Who pulled the engine off of him?

A. Mr. Fred.

Q. That is the engineer.

A. Yes, sir.

75 Q. Who uncoupled the cars and let them pull them off?

A. I don't know whether it was the car checker or the yard-

master.

Q. Was he a white-man or negro?

A. White man.

Q. You don't know who it was?

A. No, sir.

Q. They had to uncouple the cars did they, to pull the engine ahead?

A. Yes, sir; he was back about four cars from the engine.

Q. Back down the train?

A. Yes, sir.

Q. He wasn't up in front of the engine?

A. No, sir.

Q. He was back down side of the train?

A. Yes, sir.

Q. About four cars down there?

A. Yes, sir.

Q. And he ran up to where this was didn't he?

A. Yes, sir.

Q. The engineer called him didn't he?

A. No, sir; I didn't hear him. I heard them hollering.

Q. But you didn't hear what they said?

A. No, sir; there were some over there about them gang cars that were hollering.

Q. The engineer was—was he on your side or the other side?

A. He was on my side.

Q. He was over there on your side when he uncoupled it?

A. Yes, sir.

Q. Did you go over there after they pulled the engine off of him?

A. Yes, sir.

Q. What did they do?

A. The switch-engine pulled a car up there and they put him in the car.

76 Q. You went in there with him?

A. Yes, sir.

Q. When you first went up there where he was, was he unconscious?

A. Yes, sir.

Q. He wasn't able to talk at all?

A. No, sir.

Q. Just lying there on the track?

A. Yes, sir.

Q. Did he ever regain consciousness at all before he died?

A. No, sir.

Q. Where did the switch engine take him?

A. Took him up there on Press & Errquart.

Q. You rode in the car with him?

A. Yes, sir.

Q. Who else *when* in the car with you Dennis?

A. No body.

Q. Just you and Van?

A. Yes, sir.

Q. Did the conductor go in the car with you?

A. No, sir.

Q. Do you know the conductor that was on that train?

A. No, sir; I know there wasn't anybody in the car but me.

Q. Do you know Mr. Charlie Stroble?

A. No, sir.

Q. You don't know him?

A. No, sir.

Q. Do you know whether he went along on the engine?

A. Went on the engine?

Q. Yes, whether the conductor, Mr. Charlis Stroble went along on the engine down to Press Street with the engine?

A. There were several on top of the box car and several in the switch engine, but there wasn't any body in the car but me.

77 Q. When you got up there on the car did the conductor come in there and ask you if you had seen the accident, when you got in the car where the man was? Didn't the conductor of that train or some what man, if you don't know him, come there and ask you whether or not you saw this accident?

A. Yes, sir.

Q. And didn't you tell him that you didn't see it?

A. No, sir.

Q. Didn't you tell him that you were up above there and that you didn't see it at all, and didn't know how it happened?

- A. No, sir.
- Q. What did you tell him?
- A. I told him I was looking right at it. He said, How was it done?
- And that time, another man called him.
- Q. He asked you how it was done?
- A. Yes, sir.
- Q. And that time another man called him?
- A. Yes, sir.
- Q. You say you don't know Charlie Stroble?
- A. No, sir.
- Q. You know who it was asked you that?
- A. No, sir; I don't know him.
- Q. And you did tell him you were looking right at it, and saw it?
- A. Yes, sir.
- Q. When you got up to Press Street the ambulance had been telephoned to come for him, hadn't it?
- A. Yes, sir.
- Q. And when the doctors come, he was so near dead they couldn't do anything for him?
- A. They didn't take him at all.
- Q. And he died there before they could get him away at all?
- A. Yes, sir.
- 78 Q. Did you go with his body to the morgue?
- A. No, sir.
- Q. All you know is they took it in a wagon?
- A. Yes, sir. In a dead wagon, that is all I know.
- Q. You say they called this train train No. 40, you don't know, you don't know, you were not a railroad man you say?
- A. No, sir.
- Q. You didn't run on this road at all?
- A. No, sir.
- Q. And you don't know of your own knowledge what train it was?
- A. No, sir.
- Q. You just know it was a freight train?
- A. Through freight, that is all.
- Q. You don't know that do you?
- A. No, sir.
- Q. You didn't go with him did you?
- A. No, sir.
- Q. You don't know where they carried him to, do you?
- A. No, sir.
- Q. You didn't have anything to do with working on it or running?
- A. No, sir.
- Q. You didn't know where it was going of your own knowledge; you didn't know anything except what your opinion about it was, you didn't know as a matter of fact where that train was going?
- A. No, sir.
- Q. And you left this place where the accident occurred before they ever moved the train, didn't you?
- A. Before they ever moved it?

Q. Yes, before they moved the train?

A. Yes, sir. I left it.

Q. You didn't go back up there?

A. No, sir.

Q. You didn't go back up there that night?

A. No, sir.

79 A. You don't know of your own knowledge whether they moved that train at all that night, whether they carried it out or not?

A. I heard that they carried——

Q. I mean what you know?

A. No, sir; I don't know.

Q. So far as you know you don't know whether they ever pulled that particular train out of there?

A. No, sir.

Q. And you don't know where any of those cars that were on there were going to in the train?

A. No, sir.

Q. Did you see any men over there in those camp cars?

A. Yes, sir.

Q. How many did you see over there?

A. I seen two.

Q. Two men. They were white men or negroes?

A. Colored fellows.

Q. They were on the opposite side of the engine from you weren't they?

A. Yes, sir.

Q. When this accident happened?

A. Yes, sir.

Q. Well, where were they when you saw them?

A. Standing up in the door.

Q. Standing up in the door?

A. Yes, sir.

Q. Of one of the camp cars?

A. Yes, sir.

Q. Were they looking out towards this engine on the side that the engine was?

A. Yes, sir.

Q. The camp cars are on the other side of the engine from you?

80 A. Yes, sir.

Q. Were there any cars between the engine and the camp cars?

A. No, sir.

Q. So, they were in as good position to see what happened as you were?

A. Yes, sir.

Examination by Mr. Fewell:

Q. Dennis, I want to show you a cut from an engine which is shown on page 215 of this little book. Does that pretty fairly repre-

sent the back end of an engine such as the one that killed Van Harris?

A. Yes, sir; that is the back end.

Q. Were these air hose you speck of, were they hanging or were they fastened up like appears on that cut?

A. Well, these on the engine, they were fastened up and these on the cars wasn't.

Q. That is shown on page 215 of this book isn't it?

A. Yes, sir.

Q. Now, on page 217 is the front end of a car, isn't it, box car?

A. Yes, sir.

Q. Does that pretty fairly represent the end of the box car that the engine was coupling to at the time Van was killed?

A. Yes, sir; only this here hose wasn't coupled up.

Q. The air hose wasn't coupled up?

A. No, sir

Q. Where were these bolts you speak of on the end of the engine that killed Van?

A. There was the big bolt on the side of the bumper.

Q. On both sides of the bumper?

A. Yes, sir.

Q. Will you let that page 215 and 217 be identified as a part of your testimony?

81 A. Yes, sir.

Mr. Fewell: We offer those pages, if your Honor please, just for the description of the book called "Train Rules and Train Dispatching" by Dalby.

Mr. Bozeman: We object to those cuts, if your Honor please, because they are certainly not competent evidence. This witness don't pretend to say that they are cuts of this engine or this car, only that they are fair representations of it.

The Court: I will let it go in.

To which action and ruling of the Court, the defendant then and there excepted.

Q. Did you know Cheney Harris till you came to Court here yesterday?

A. No, sir.

Q. Have you ever seen her in your life that you know of?

A. No, sir; never have

Q. Were you acquainted with any of the people interested in this suit outside of the lawyers?

A. No, sir.

Q. And when did you make their acquaintance?

A. Made their acquaintance yesterday.

Mr. Bozeman: You talked about this case, the lawyers questioned you about it and you went over it yesterday before you testified; when you came here you went to see them and talked to them about it?

A. Yes, sir; I have talked to them about the case.

Q. Who was it that came to you and got you to come up here?

A. Nobody.

Q. Who wrote to you to come up here?

A. Mr. Fewell.

Q. Mr. Fewell?

A. Yes, sir.

82 Q. You had some correspondence with them about it? Did you have any besides that letter asking you to come up here?

A. No, sir.

Q. Did you ever talk to anybody about it at all before they asked you to come up here except this boy Johnny Jones?

A. Did I ever talk about it to anybody before?

Q. Yes, besides this boy Johnny Jones, before you came up here?

A. No, sir.

Q. Nobody at all?

A. No, sir.

Q. And you never had talked to anybody but Johnny Jones about this case till you came up here to Meridian?

A. No, sir.

Q. Nobody at all?

A. No, sir.

Q. Is Johnny Jones any kin to Van Harris?

A. No, sir.

Q. No kin to him at all. This cut in the book that Mr. Fewell asked you about on page 215, which shows the back of an engine now, you don't pretend to say that that cut is exactly like the back of this engine in this accident do you?

A. Exactly like it, but it haven't got the bolts that engine had on it.

Q. This cut don't show any bolts at all?

A. No, sir; don't show the bolts.

Q. You say it is exactly like it in every other way?

A. Like the engine; it is just like the back of that engine except them bolts ain't there.

Q. Does it show the steps you rode on when you were riding back there?

A. No, sir; that step ain't there.

Q. It don't show that step?

A. No, sir.

Q. And it don't show the bolt?

A. No, sir.

83 Q. Does it show the step Van Harris was riding on?

A. No, sir; it don't show any steps at all, if it is, I don't see them.

Q. Does it show the hand-hold you say he had his arm in?

A. No, sir.

Q. It don't show that. You never examined the couplers on that engine did you?

A. No, sir; I had no right.

Q. Engines have different sorts of couplers on them, don't it? or do you know?

A. No, sir; not that I know of.

Q. You think every engine has got the same sort of coupler?

A. Yes, sir.

Q. And same sort of bumper?

A. Yes, sir.

Q. Don't a passenger engine and a freight engine have different sorts of bumpers and couplers?

A. No, sir; I don't think they do.

Q. You don't know whether they do or not?

A. They have got the same, Janny couplers, the same as on all I have ever seen.

Q. Describe to the jury what a Janny coupler is?

A. A Janny coupler is when it backs up they catches just the same as a hook.

Q. All automatic couplers catch when they back up don't they?

A. Yes, sir.

Q. Are there different kinds of couplers that do that besides the Janny?

A. Not them that I have seen on the engines.

Q. Did you ever work in a shop?

A. No, sir.

Q. Did you ever work about an engine?

A. No, sir.

84 Q. How did you become so familiar with an engine and all about that if you never worked on a railroad or round a shop?

A. My father worked at the round house washing on boilers, and I would carry his dinner and I didn't have anything to do but study those things.

Q. When you would carry your father his dinner you would learn about those couplers and things?

A. Yes, sir.

Q. Does this cut show the air hose just like on that other engine?

A. Yes, sir; if that represents air hose that is the way they were situated.

Q. That is the way they were situated?

A. Yes, sir.

Q. Does that show any air hose hanging down?

A. No, sir.

Q. Do you know whether that is the air hose or not on that engine what those represent there?

A. No, sir; but that is where they are due to be at. I don't know whether that is it or not.

Q. If that was it you don't know whether it was that way or not?

A. If it was, it was hooked in a chain.

Q. The lower end was?

A. Yes, sir.

Q. It wasn't hanging down?

A. No, sir.

Q. It was hooked up?

A. Yes, sir.

Q. Was the one on the car hooked up too?

A. No, sir.

Q. That was hanging down?

A. Yes, sir.

85 Q. Did Van unhook it before he got hurt?

A. Yes, sir.

Q. He got it unhooked?

A. Yes, sir.

Q. This cut of the car on page 217, does that show the air hose?

A. Yes, sir; that represents it up there, represents that.

Q. Do you know the difference between the different ends of a box car? Is there any difference between different ends of it?

A. No, sir. I never noticed the difference.

Q. You don't know which end of the box car this cut represents do you?

A. No, sir.

Q. That don't show any air hose hanging down, this cut, does it?

A. No, sir; it don't show it.

Q. You don't know what kind of coupler was on the end of that car do you?

A. Automatic coupler.

Q. It wasn't an automatic coupler?

A. It was an automatic coupler.

Q. On the next car?

A. Yes, sir.

Q. And also on the engine?

A. Yes, sir.

Q. And when the engine backed up against the car it made the coupling?

A. Made the coupling.

Q. Van didn't have to go in between the cars at all to make the coupling?

A. No, sir.

Examination to Mr. Fewell:

86 Q. Mr. Bozeman asked you something about some correspondence with me Dennis. Have you had any correspondence or have you received any letters or have I written you any letters or have you written me any letters?

A. You written me a letter, asked me did I know an-thing about the injury of Van Harris.

Q. Was there any suggestion made to you about how you should testify or how it happened?

A. No, sir. You told me if I did, I would be summoned as a witness.

Q. I did send you a summons to be signed, didn't I?

A. Yes, sir.

Q. You signed it and sent it back to me didn't you?

A. Yes, sir.

Q. You made two trips to Meridian to see me didn't you?

A. Yes, sir.

Q. I will ask you if there has been any suggestions made to you by anybody connected with this case to tell other than the truth as you saw it?

A. No, sir; not any.

Mr. Bozeman: When was the last trip you made before this Dennis?

A. In July.

Q. Of this year?

A. Yes, sir.

Q. Who did you stay with?

A. Didn't stay with anybody; come in here that morning and left that night.

Q. Went back to New Orleans?

A. Yes, sir.

(Witness excused.)

Mr. MARTIN SEEGAR, being first duly sworn, was produced and testified as follows, to-wit:

87 Direct examination by Mr. Fewell:

Q. I will ask you Mr. Seegar whether or not you went to New Orleans at my request to investigate the killing of Van Harris?

A. I did.

Q. Did you have pointed out to you approximately where the killing occurred?

A. I did. Went down to it.

Q. Tell the jury whether or not the track about where Van was killed was on a level or on a grade?

Mr. Bozeman: We object to that if your Honor please, as being incompetent and hear-say-testimony. He says he had the place pointed out to him.

The Court: I think that is incompetent.

Q. Who pointed the place out to you Mr. Seegar?

A. One of the cqr—the car greaser, I disremember his name.

Q. Did he claim to know where the accident happened?

Mr. Bozeman: We object. What he claimed to know is purely hear-say and clearly incompetent.

Sustained. The plaintiff excepted.

(Witness excused.)

Mr. CHARLIE STROBLE, being first duly sworn, was produced and testified as follows, to-wit:

Direct examination by Mr. Thos. G. Fewell:

Q. Your name is Charlie Strobel?

A. Yes, sir.

Q. Conductor on the New Orleans and Northeaster?

A. Yes, sir.

Q. Did you know Van Harris in his life time?

A. Yes, sir.

Q. What position did he occupy on your train Mr. Strobel?

A. Brakeman.

Q. What train were you fixing to pull that morning?

88 A. What morning?

Q. The afternoon that Van was killed?

A. 38 freight train.

Q. 38, what sort of train was it?

A. Freight train.

Q. Well, was it a local train or through train?

A. Through train.

Q. From what point Mr. Strobel?

A. From New Orleans.

Q. And where was the terminal from New Orleans to what point?

A. To Meridian.

Q. That is, from New Orleans, La., to Meridian, Miss., was it?

A. Yes, sir.

Q. Did you have freight in your train?

A. Yes, sir.

Q. Bound from New Orleans to Meridian?

A. Yes, sir.

Q. Mr. Strobel, did you see the accident?

A. No, sir.

Q. *Mr. Strobel, did you see the accident?*

A. *No, sir.*

Q. How long had Van Harris been working with you as one of your crew Mr. Strobel?

A. That trip, only once, just that trip.

Q. Can you tell the jury whether or not he had been braking on the Northeastern for any length of time?

A. Yes, sir; he had been braking; he had made trips for me before that, just extra trips.

Q. He had made extra trips for you before that?

A. Yes, sir.

Q. Do you know what the average pay of a brakeman is, negro brakeman?

A. Yes, sir.

Q. What is the average?

A. 59—

89 *My Bozeman:* We object to that as being incompetent.

The Court: If it is your purpose to prove they all get the same pay, I will let it go in.

Q. Answer the question Mr. Strobel?

A. \$59.00 a month on my run.

Q. Do you have a regular run?

A. Yes, sir.

Q. Of course it wouldn't amount to that much if the brakeman didn't work regularly would it?

A. No, sir.

Q. Now, Mr. Strobel, what time in the afternoon was it that Van was killed?

- A. 5:10 in the evening.
- Q. Where were you at the time of the accident?
- A. About 15 or 20 cars south of the engine.
- Q. And on what side of the train?
- A. On the west side.
- Q. Was that the fireman's side or engineer's side?
- A. Fireman's side.
- Q. What were you doing Mr. Strobel?
- A. Checking the train.
- Q. What attracted your attention to there being something wrong at the front end of your train?
- A. My engineer came back and told me.
- Q. That is Mr. Fred Strobel was your engineer?
- A. Yes, sir.
- Q. How far back from the end of the train were you when Mr. Fred Strobel told you something was wrong with the—
- A. I was the 9th car.
- Q. You mean you were the 9th car from the engine or from the caboose?
- A. Ninth car from the engine.
- Q. How many cars did you have in your train Mr. Strobel?
- A. 47 I think; I will count them to be more positive.
- Q. Well, approximately 47?
- 90 A. Yes, sir.
- Q. Then what did you do when you were notified about this situation Mr. Strobel?
- A. Came up there to see where he was and saw the position he was in.
- Q. Was he still under the car?
- A. No, sir; they had moved the engine off of him.
- Q. They had moved the engine when you got there?
- A. Yes, sir. I went to the telephone and telephoned the yard-master to order the ambulance and we proceeded to make arrangements to take him to the south end of the yard.
- Q. How did you get him up off the place where he was hurt?
- A. We got a ladder from the yard office there and some old sacks or something, on this old ladder and made a *little* and put him on that and put him in a box car and carried him to the south end of the yard.
- Q. Did you go from the place of the accident to the south end of the yard?
- A. Yes, sir.
- Q. What place did you ride?
- A. In the box car with him.
- Q. Was there anybody in there with him besides you?
- A. There were three or four switchmen in there, I don't remember their names. I didn't pay any attention to their names.
- Q. You didn't pay any attention to their names?
- A. No, sir; three of four switchmen, I didn't pay any attention to their names.
- Q. You took the box car where?

A. To the team track where the ambulance could back right up to the car.

Q. Was the ambulance there when you got there?

A. No, sir.

Q. Had it got there before you left?

91 A. No, sir. It wasn't there when I left him. I left him there and turned him over to the yard-master, and I went on back to my train.

Q. You left him there in the box car?

A. Yes, sir.

Q. And went on to the train?

A. Yes, sir.

Q. Did you see who it was uncoupled the tank from the train to get this man off?

A. No, sir.

Q. You don't know who it was?

A. No, sir.

Q. Whose duty was it to couple the engine to the cars?

A. The brakeman's.

Q. That was Van's duty wasn't it?

A. Yes, sir.

Q. Whose duty was it to couple the air hose up between the tender and cars?

A. The brakeman's.

Q. Mr. Stroble, where this accident occurred, give the jury some idea about the lay of the land, whether it was on a grade and if on a grade, which way, or whether it was on a level or not?

A. Level.

Cross-examination by Mr. Bozeman:

Q. Mr. Stroble, you were the conductor I believe you say on that train?

A. Yes, sir.

Q. In what part of the yard was it that this accident occurred?

A. At the east rail of No. 2 track, on the east side of the yard in the north end.

Q. North end of the yard?

A. Yes, sir.

92 Q. You say that you were about nine cars back from the engine when the accident occurred?

A. No, sir; I was further back than that when the accident occurred, but I was nine cars from the engine when I was notified of the accident.

Q. Where had you come from when you were notified of the accident?

A. Come from the caboose, checking the train up.

Q. Checking the train?

A. Yes, sir.

Q. Did you see the engine when it backed up there to couple to this train?

A. No, sir; I didn't notice it.

Q. Who was the engineer?

A. Fred Strobel.

Q. Who was the fireman on that train?

A. Will Crewel.

Q. Did they have a flagman?

A. Yes, sir.

Q. Who was the flagman?

A. George Hintz.

Q. Do you remember where Mr. Hintz, the flagman, was?

A. I left him in the caboose lighting the lamps. He was behind me.

A. Left him in the caboose?

Q. About how many cars were in that train Mr. Strobel?

A. I don't know sir, Mr. Bozeman. I will have to count them. I think it is 47 to be positive.

Q. Well, find out?

A. Forty-eight cars.

Q. 48 cars?

A. Yes, sir.

Q. In the train?

A. Yes, sir.

93 Q. Well, did you see this engine while it was on the way from Press Street up to this point where it was to couple up to the train Mr. Strobel?

A. Yes, sir.

Q. Where was it when you saw it?

A. Standing still over on No. 9 track at Claiborn Street crossing.

Q. You go over there where it was?

A. No, sir; I don't remember going to the engine there at all. I crossed Claiborn Street crossing checking the train and they were standing about, I suppose, 200 feet over to the west.

Q. Well, now when Mr. Fred Strobel, your brother, told you that this accident had occurred, had you observed at all from the position where you were along checking this train the engine backing against the cars?

A. No, sir.

Q. Assuming that this engine had coupled to the train before that was there any movement of the cars back where you were?

A. No, sir.

Q. Or, did you hear any fuss or noise of the engine striking the cars or the different cars striking each other, or anything of that kind?

A. No, sir.

Q. Anything there to indicate that the coupling was made by a hard strike of the engine?

A. No, sir.

Q. I believe you say you knew nothing of the accident till Mr. Fred Strobel told you?

A. I didn't know a thing of it till he told me.

Q. Then you went up there did you?

A. Yes, sir.

94 Q. Had the engine then been uncoupled from the train and pulled away from this man Van Harris?

A. Yes, sir. The engine then was about 15 or 20 feet from the train.

Q. Where was Harris lying when you got there?

A. He was lying on the east rail with his head south with one arm on each side of the rail, laying in that position, with his head back south.

Q. Was he conscious or unconscious?

A. He was unconscious.

Q. Did he ever regain consciousness at all?

A. No, sir.

Q. You say you picked him up and put him in a box car?

A. Yes, sir.

Q. Who called that box car to take him down there Mr. Strobel?

A. I did. I asked the yard-master to get me an empty car.

Q. Was that the quickest method you had of getting him to the hospital or to the doctor?

A. No way for an ambulance to get up in there. We had to take him to the south end of the yard.

Q. You did that as quickly as you could?

A. Yes, sir.

Q. In getting him in this box car did you ride in the box car with him?

A. Yes, sir; right up in the door, standing up in the door.

Q. Was there anybody else there in the box car where Van Harris' body was after you put him in there and as you went on up to the other station except yourself?

A. Yes, sir; there were two or three switchmen in the car, and I am not positive, but I think the yard-master, Mr. Short, was in the car. I remember he helped put him in the car.

Q. You are certain you rode in it?

A. Yes, sir; I rode in the door of the car.

Q. Were there any negroes in the car too?

95 A. Yes, sir; there was a negro in there.

Q. Were these switchmen that you refer to, were they white or colored?

A. White.

Q. Was there any negro in the car at all besides Van Harris?

A. Yes, sir; there was a negro there.

Q. Just one?

A. One negro, yes sir.

Q. Did you have any talk with him about the accident?

A. Yes, sir.

Q. Did you ask him whether or not he knew anything about the accident?

A. Yes, sir.

Q. What did he tell you Mr. Strobel?

A. I asked him his name. He mumbled out some name, I forget

what it was, and I asked him if he saw the accident, or knew anything about it? He said he didn't. I asked him did he live in New Orleans. He said, no, he didn't live in New Orleans. He was fixing to ride out on that train. So I didn't take any name from him. I just thought he was a hobo.

Q. Do you remember how he was dressed?

A. Had on blue overalls.

Q. Were you there in the car right with Harris when you asked him if he knew anything about it?

A. Yes, sir; that was after we got down to the south end of the yard with Harris.

Q. How come you to ask him if he saw the accident Mr. Harris?

A. I wanted all the witnesses that I could get that saw it, so I could get a statement from him.

Q. He was the only negro in the car?

A. Yes, sir.

Q. Did he ride on up in the car with Harris?

96 A. Yes, sir; he got in the car. I think he helped put Harris in this car. This negro did. We called him to help put him in there.

Q. Did you see where he come from?

A. He come from north of the engine. I called him to help put him in the car.

Q. When you called him, he was just north of the engine?

A. Yes, sir.

Q. You remember on which side of the engine?

A. He was on the west side then.

Q. Was he standing any where right opposite the north end of the string of cars there that the engine had coupled to?

A. No, sir.

Q. Now, Mr. Strobel, you saw of course, where the north end of the string of cars was that this engine was going to couple to when you went there?

A. Yes, sir.

Q. And you say the engine had been pulled about how far from it?

A. About 15, probably 20 feet in all from those cars.

Q. Assuming that this little mark here on this diagram of the paper was the north end of the string of cars here?

A. Yes, sir.

Q. The engine then was up here?

A. Yes, sir.

Q. Where was this man standing when you called him to help you?

A. He was north of the engine up here.

Q. Standing north of the engine?

A. Yes, sir.

Q. I will ask you whether or not he was standing right opposite the end of these cars here on either one of these side tracks here?

A. No, sir; he was up here and the car we put Van in was on a number 9 track, across this way. We picked him up here

97 and toted him right across and this colored man come across here and helped put him in the car.

Q. Come across from north of the engine?

A. North of the engine, yes.

Q. That is the same colored man that rode with Van?

A. Got up in the car right then. I presume he intended to help take him out of the car, from the way he got in there; but we left him in the car for the ambulance men to handle.

Q. You put him in charge of the yard-master?

A. Yes, sir.

Q. That man told you he hadn't seen it and didn't know anything about it?

A. Yes, sir.

Q. Mr. Strobel, after you carried Harris up to the ambulance did you come back there and make any examination of the couplers between the engine and car where he was hurt?

A. Yes, sir.

Q. Well, just state to the Court and jury whether the couplings on the engine and on the north end of the car were in good condition and repair?

A. Yes, sir.

Q. Just explain to the Court and jury what experiments or what examination you made there to see if they were in good shape Mr. Strobel?

A. I examined both draw heads and had the couplings made twice, separated it twice in order to see that it was O. K.

Q. What kind of couplings were they?

A. It is a Major coupling on the car. I think it is a Climax on the engine. They are both automatic couplers.

Q. State whether or not those couplers would couple without a man having to go in between the engine and car to couple them?

A. Yes, sir; you don't have to go in there to open a knuckle.

98 Q. In these two times that you tried it right after this accident did they couple without anybody having to go in between there at all?

A. Yes, sir.

Q. Coupled automatically?

A. Yes, sir.

Q. Did you examine the air hose on the rear of the engine and on the front end of this car, north end of the car?

A. No, sir.

Q. Was there anything the matter with them?

A. No, sir; I did not examine the air hose, but if there had been anything wrong with them we couldn't have left there with that car.

Q. The air hose, they were standing apart,—the engine and the car when you got there?

A. Yes, sir.

Q. They were uncoupled?

A. Yes, sir.

Q. You saw the air hose did you?

A. Yes, sir.

Q. Did you observe anything wrong with them at all?

A. No, sir.

Q. Did this engine and train leave there?

A. Yes, sir.

Q. Was it operated to what point from there?

A. That car was set out at Picayune; the engine come on through to Meridian with the rest of the train.

Q. The rest of the train came on through to Meridian?

A. Yes, sir.

Q. Was there any trouble with the coupling of the air hose there in the operating of that train at all?

99 A. No, sir.

Q. How long has Mr. Fred Stroble, the engineer, been a locomotive engineer Mr. Strobel?

A. I don't know.

Q. Well, about how long?

A. Well, I have been here 14 years, and he was here when I come here.

Q. Running a locomotive engine at that time?

A. Yes, sir.

Q. Locomotive engineer all that time.

A. Yes, sir.

Q. On the Northeastern road?

A. Yes, sir.

Q. Has he pulled you on your train?

A. Pulled me 19 months regular.

Q. State to the Court and jury whether or not he is a competent engineer Mr. Strobel?

A. Yes, sir; he is competent.

Q. Who was the fireman on that engine?

A. Was Will Crewell.

Q. A negro?

A. Colored man, yes sir.

Q. Was he about there when you went up there to see about this accident?

A. No, sir; he wasn't around on the ground; I didn't notice him or pay any attention to him.

Q. Mr. Stroble, did you make any examination of the front end of that car and the rear end of the engine tank to see whether or not there was any block on any part of the engine?

A. Yes, sir.

Q. Did you find any blood?

A. Yes, sir.

Q. Where did you find it?

100 A. Found blood on the lift lever, on the north end of the car, and on the bottom of the storm board of the engine, the vestibule bumper it is called, on the bottom of the vestibule bumper.

Q. Which side of the coupler was the blood on?

A. There wasn't any on the coupler.

Q. I mean—On which end of the car and engine was the blood on?

A. On the south end of the engine and on the north end of the car, the lift lever, but on the east side of the center.

Q. On which side of the center?

A. On the east side.

Q. The coupling is in the middle of the engine, isn't it?

Q. Yes, sir.

Q. This blood that you found was between there and the end of the engine?

A. Yes, sir.

Q. And it was on the bottom of this vestibule bumper?

A. Yes, sir.

Q. Is that vestibule bumper, is that above or below the coupler?

A. It is above the coupler.

Q. It is above the coupler?

A. Yes, sir.

Q. The blood on the north end of the car you say was on the lift lever?

A. Yes, sir.

Q. How does that lift lever run on the car? Does it run entirely across the car or just half way on this particular car?

A. I can explain it on that table.

Q. All right, do that?

A. The draw head comes right out here in the center of the car, the lift lever runs from here, with that lift lever in that position and comes out about that way in the center of this draw-head, and then there is an arm goes underneath it connects with the knuckle underneath the drawhead, and this lift-lever opens that draw head and enables you to go in, you don't have to open the draw-head. This blood was on the lift-lever and the bottom of the vestibule bumper.

Q. It was between the bumper and the northeast corner, we will say, of that car?

A. Yes, sir; the blood was on the lift-lever.

Q. That projects out a little in front of the corner of the wood work of the car?

A. Yes, sir; about eight inches.

Q. Were those coupling apparatus and lift-lever on that car, were they the standard automatic couplers and levers, were they?

A. Yes, sir.

Q. The couplers and the lift-levers on the engine, were they standard also?

A. Yes, sir.

Q. Did you find any blood on any bolt attached to the end of the tender of the engine?

A. No, sir.

Q. Is there any blot in the end of the engine there, say four inches square, in the end of the engine back of the tender?

A. Yes, sir; draft bolt runs through there.

Q. Where is that draft bolt located, assuming that this table is the end of it, I mean is it nearer the center or nearer the corner or where is it?

A. It runs about, I suppose a foot from the end of the tender clean through from one end-sill to the other.

Q. Is there any projection of that bolt out from the end of the engine?

A. Just about as much as a nut would cover, just about that much.

Q. Is there anything opposite that on the end of a car that when the engine and car were coupled together, pushed together would be close enough together to catch a man's head between it?

102 A. Not between those bolts.

Q. Was there any blood on that bolt at all?

A. No, sir.

Q. Any indication that that bolt had struck this man?

A. No, sir.

Q. How long had you know Van Harris as a railroad brakeman?

A. I really don't know Mr. Bozeman. I suppose a year or so.

Q. Had you had him on your train as brakeman before this?

A. Yes, sir.

Q. Had you observed him in the coupling of cars and uncoupling them?

A. Yes, sir.

Q. Just state to the Court and jury whether or not in the coupling and uncoupling of cars and using these automatic couplers, whether or not he was careful or not?

Mr. Fewell: We object to that.

Q. I will ask you whether or not before this accident that you had at any time warned Van Harris as to the manner in which he was in the habit there?

A. Yes, sir.

Q. Of coupling and uncoupling cars?

Mr. Fewell: We object to that and move to exclude the answer.

The jury was sent out of the hearing of the Court when the following proceedings were had and entered of record to-wit:

Mr. Bozeman: We propose to show by this witness that the deceased Van Harris was in the habit of going in between cars while they were in motion to make couplings of the air hose when that was unnecessary, and that this was a very dangerous practice, and that this witness as the conductor over him had warned him time and again that it was dangerous to do that, and that he must not go in between moving cars to make couplings of the air hose; and we propose to follow that up by the testimony of other witnesses to show that on this occasion that Harris went in between the engine and car while the engine was in motion to make this coupling of the air hose, and before it had stopped, and he was injured in that way; and in the very way that he had been warned by this witness time and again to avoid.

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The Court: If competent at all, I don't think it is so at this stage of the case as made.

To which action and ruling of the Court, the defendant then and there excepted.

The jury was brought back into Court, when the following proceedings were had and entered or record, to-wit:

Mr. Bozeman: Mr. Stroble, while you were along side of this train, state to the jury whether there was any movement of any of the cars or any of the cars in this train indicating that the engine had moved the second time after the coupling had been made?

A. No, sir.

Q. Explain to the jury Mr. Strobel the method of coupling the air hose, the proper method of coupling the air hose between the engine and car and when that is done?

A. That is done after the engine is coupled to the cars and standing perfectly still.

Q. Is there any arrangement or appliance by which the air hose can be coupled automatically without a man going in between the cars?

A. No, sir.

Q. The air hose is the rubber hose attached to what you call a train line running under the cars, ain't it?

A. Yes, sir.

Q. And that has to be flexible, the rubber hose, to give the motion of the train?

A. Yes, sir.

Q. To keep it from being broken?

104 A. Yes, sir.

Q. So you have coming out from the cars a rubber hose?

A. Yes, sir.

Q. And the same way from the engine a rubber hose?

A. Yes, sir.

Q. And from each end of the cars you have those rubber hose?

A. Yes, sir.

Q. When they are not coupled together, do they swing down or now?

A. They just swing down.

Q. How long are they? Sufficient to strike the ground?

A. No, sir; about three inches from the ground. Most of the engines have a rack for that air hose to hang in, to keep it from swinging down, but it is very seldom there is a car with that rack on it.

Q. What if anything is there on the base to couple them together?

A. There is an iron coupler to couple them and kindly twist that way.

Q. How do they have to be coupled? What is the proper method of coupling an air hose?

A. When you couple an engine and string of cars or any one car that way, the couplers are under the two draw-heads and you reach down there and couple them together, that lets your air go through

the string of cars; that is down after the draw-heads have been coupled.

Q. With this train standing there as they were, was there any air in the car line?

A. No, sir.

Q. The brakes in that car were not set?

A. Not the air brakes.

Q. And in order—after you couple the air hose, your air comes through the train from the engine?

A. From the engine.

Q. What do you have to turn to let the air come through from the engine.

A. Angle cock on the train line.

Q. Where is that angle cock situated, say on the engine?

A. It is situated right under the end-sill on the back end of the tank.

Q. Which side? Say we will take this engine that is headed north there?

A. If an engine is headed north the angle cock would come like here is the draw-head under the end-sill on the east side.

Q. And on that end of the car where would that angle cock be?

A. Be on this side of the draw head.

Q. Be on the opposite side of the draw-head?

A. On the west side of the draw head, under the end-sill.

Q. Those angle cocks are turned after you make the coupling of the rubber hose?

A. Yes, sir.

Q. Did you observe in this case to see whether either of those angle cocks had been turned by Van Harris?

A. I couldn't tell.

Q. You didn't observe about that?

A. I couldn't tell.

Mr. Fewell: I move to exclude that.

Which motion was by the Court sustained; to which action and ruling of the Court, the defendant then and there excepted.

Q. Did you make any examination of them at all Mr. Strobel?

A. No, sir; I did not.

Q. Is that what you mean what you said you couldn't tell?

A. Yes, sir.

106 Mr. Fewell: Mr. Strobel, Mr. Bozeman asked you about coupling up an engine to a car, tank to a car, there is no necessity at all for a man going in between the cars when they go to couple up the draw heads is there, if the draw heads are in good working order?

A. No, sir.

Q. The draw heads, when they are properly equipped couple automatically as we speak of?

A. Yes, sir.

Q. The law requires them to be that way doesn't it?

A. Yes, sir.

Q. So there is no necessity for a man who is going to couple an engine to a car going in between there if the draw heads are all right, that is true, isn't it?

A. Yes, sir.

Q. There is a necessity if the draw heads have been coupled on the train if he is working his air to reach down and catch these two air hoses to couple them?

A. Yes, sir.

Q. And that swings like a hammer under the draw head?

A. Yes, sir.

Q. And that is made of a fibrous rubber, isn't it?

A. Yes, sir.

Q. What length are those air hose?

A. They are about that long.

Q. One goes from one end of the tank you are going to couple, and one from the other? for instance, one on the engine about that long and one on the car about that long?

A. Yes, sir.

Q. So that there is a swing under the coupler for that air hose, you say, the best way to couple that is to wait till the train stops?

A. Yes, sir.

107 Q. You don't know whether Van waited till the train stopped to couple that air hose or not, do you?

A. No, sir.

Q. You weren't able to see that?

A. No, sir.

Q. Do you know what engine was running that day?

A. Yes, sir.

Q. What was it you said about the end-sill, didn't you say something about the storm-sill?

A. I said the blood was on the bottom of the vestibule bumper.

Q. What is that?

A. There is a vestibule comes down over the back of the engine.

Q. You mean this engine was equipped with a passenger vestibule bumper?

A. Yes, sir.

Q. Like in the passenger service?

A. Yes, sir.

Q. They don't use them in the freight service?

A. No, sir.

Q. Useless in the freight service wasn't it, the vestibule bumper?

A. Yes, sir.

Q. And that extends out how far from the end of the tank?

A. About eight or nine inches.

Q. Eight or nine inches, and that is built on to an accordion contraption isn't it, and it works backwards and forwards away from the engine?

A. No, sir; there is a spring in this bumper that works back and forward, but the vestibule bumper don't. It is stationary on the engine.

Q. That is not true on the passenger car?

108 A. On the passenger car, the vestibule works but on the engine—

Q. But on the engine the springs works backward and forward?

A. The bumper there.

Q. The vestibule bumper works that way?

A. Yes, sir.

Q. You say that is down at the bottom?

A. Yes, sir.

Q. You say when that vestibule bumper is in repose we might say, that extends seven or eight inches from the tank?

A. From the tank.

Q. Suppose it is fully extended, can it be extended any further than that?

A. No, sir; it is stationary.

Q. That is something unusual on the back end of the freight engines, isn't it?

A. I don't know. I suppose this engine was used in both services.

Q. But that *think* on the back end of that tender couldn't serve any purpose in the operation of a freight train could it?

A. No, sir.

Q. Did you tell Mr. Bozeman there were some draft bolts that come out on each side of the draw-head of the engine that run through and through?

Ans. Not on the draw-head; on the end sill maybe?

Q. I don't mean on the draw-head? I mean on the right hand of it?

A. On the end sill.

Q. The end-sill is the farthest part of the car?

A. Yes, sir.

Q. And on the outside of that end-sill you say there were some iron bolts?

A. Yes, sir; nuts.

109 Q. About what size Mr. St-obel?

A. About that size, I suppose.

Q. Square?

A. Yes, sir.

Q. Good, big iron nuts?

A. Yes, sir.

Q. How far do they extend out beyond *beyond* the end-sill?

A. About an inch and a quarter, I guess.

Q. About an inch and a quarter?

A. From the end-sill, yes sir.

Q. Were the draft bolts on the car?

A. Yes, sir.

Q. And they were in the end-sill too, were they?

No answer.

Q. Are you familiar with the rules of the New Orleans and North-eastern Railroad promulgated by the Superintendent or officials of the railroad?

A. Yes, sir.

Q. Do you know what rule 30 of your railroad is? Have you got a rule book with you?

A. Not with me, no.

Mr. Bozeman: We object, if the Court please, to any rule. The declaration doesn't make any allegation with reference to any rule to show whether or not any rule would be involved in this case at all.

The Court: I don't think it would be competent under that allegation.

To which action and ruling of the Court the plaintiff then and there excepted.

Mr. Fewell: You have been employed by the Northeastern Railroad how long?

A. 14 years.

Mr. Fewell: The plaintiff now serves notice on the defendant to produce its rule book promulgated by the general officers of the New Orleans & Northeastern Railroad for the government of its employees.

Mr. Fewell: Are you familiar with the rules of the Northeastern promulgated in a book of rules?

A. Yes, sir.

Q. Is there such a rule in your book as rule 30 promulgated by the N. O. & N. E. Railroad Co.?

A. Yes, sir.

Q. Is there such a rule as rule 85?

A. Yes, sir.

Q. Do you remember what the number of the rules 30 and 85 are in the rule book of the N. O. & N. E.?

A. No, sir.

Q. You say there are such rules?

A. There are such rules as those rules there, but I don't know whether they are under the same number or not.

Mr. Fewell: We offer Rule 30 and Rule 85, your Honor please.

Mr. Bozeman: To which we object.

Which objection was by the Court, sustained; to which action and ruling of the Court the plaintiff then and there excepted.

Mr. Bozeman: Mr. Strobel, did you make any examination of the track where Van Harris was injured there and the ground around there to see whether or not there was anything there that he might have stumbled over or he might have fallen over?

A. I did.

Q. Was there anything on the track there about there to cause him to stumble or fall.

A. No, sir.

111 Q. What was the condition of the track around there?

A. The ties were all covered over and it was level ground, smooth.

Q. Was it in good, safe condition?

A. Yes, sir.

Q. For the use of brakemen and trainmen?

A. Yes, sir.

(Witness excused.)

Mr. Fewell: The plaintiff now asks leave of the Court to amend the first ground of the declaration in the third paragraph of the second page thereof so as to insert the following at line five of said paragraph three, "and the coupling having been made."

Mr. Bozeman: I object to it, because I think it is too late to be making a new case at this stage of the *trial*.

The Court: I will let the amendment be made.

To which action and ruling of the Court, the defendant then and there excepted.

The plaintiff here rested her case.

By Mr. Bozeman: The defendant moves the Court to exclude all of the testimony offered by the plaintiff and to direct a verdict for the defendant, because that testimony fails to make out a cause of action against the defendant under the Federal Employers' Liability Act, and because the testimony shows that the deceased Van Harris left surviving him a widow who is still living, and there, that the plaintiff in this action has no right to recover anything for the motion of said Van Harris, the beneficiary named in the declaration.

Which motion was by the Court, overruled; to which action and ruling of the Court the defendant then and there excepted.

Jury brought back into the Court room.

112 Mr. Fewell: Plaintiff asks leave of the Court to let her reopen her case to introduce certified copy of the administration. (The papers referred to being attached to the declaration and made an Exhibit thereto.)

The Court: I will let it in.

The Plaintiff here rested her case.

The Clerk will here copy said file of papers.

(See page 6 of record for above Exhibit.)

113 Mr. GEO. F. HEINTZ, being first duly sworn, was produced and testified as follows, to-wit:

Direct examination by Mr. Bozeman:

Q. Were you in New Orleans at the time that Van Harris was hurt?

A. Yes, sir.

Q. In what City and State was he injured Mr. Heintz?

A. In New Orleans, La.

Q. State of Louisiana?

A. Yes, sir.

Q. Were you connected at all with that train of which Mr. Charlie Strobel was conductor?

A. Yes, sir.

Q. And that was involved there. What position did you occupy?

A. Flagman.

Q. Did you see the accident?

A. No, sir.

Q. Where were you when you first heard that Van Harris was hurt?

A. About 20 cars from the north end from where it happened.

Q. From where it happened?

A. Yes, sir.

Q. And when you say 20 cars, were you along side of this particular train?

A. Yes, sir.

Q. What were you doing Mr. Heintz?

A. Walking up towards the engine.

Q. Did you hear any noise or see any movement of this train or any of these cars along there when this engine was coupled to them?

A. No, sir.

Q. Did you hear any noise or see any movement of the cars as produced by a second motion of the engine?

A. No, sir.

114 Q. Did you go up to the engine when the accident occurred?

A. I didn't go up there; the conductor told me to finish checking up the train. He handed me his book to go back and finish checking up the train.

Q. You didn't go up there then?

A. No, sir.

Q. You don't know how it happened?

A. No, sir.

Q. Do you remember the number of the engine on that train?

A. Engine 265.

Q. Did it have what they call a vestibule frame on the back of it?

A. On the back of the tank, yes sir.

Q. Explain to the jury what sort of thing that vestibule frame is Mr. Heintz.

A. It is shaped like a door. I guess it is six foot high or maybe seven. I don't know exactly how high it is. It sets right in the center of the rear of the tank and it has got springs on it you know. When it couples to a passenger car it gives it play in there. It hinges right together, when you come from one passenger car to the other. You know those things. Well, that is the way those things play on a passenger car.

Q. How far does that stick out beyond the rear end of the tank?

A. I guess about that far. From the back of the tank to the end of that vestibule?

Q. Yes?

A. I guess it must be about—I don't know exactly. I guess it is 12 or 14 inches; something like that.

Q. Does it come out as far as the bumper or coupler on the engine?

A. It comes out as far as the bumper but not as far as the coupler, the draw head.

Q. The draw head sticks out beyond that?

A. Yes, sir.

115 Q. Is this frame made on there? Is it a part of the engine?

A. Yes, sir.

Q. It is a frame that anybody working in and around the train can easily see and observe?

A. Sure, yes sir.

Q. I will ask you whether or not you have had any experience in coupling engines—that engine or engines with like vestibule frames on the rear of the tender to freight cars?

A. I have, yes sir.

Q. State to the court and jury whether or not there is any danger in making that sort of a coupling?

A. There is not, if you open your knuckle and let the engine hit the car before you jump in between there, and if you see the coupling made and the engine stop, you can go in there and couple it, there is no danger.

Q. State whether or not it is customary on this New Orleans and Northeastern Road to use engines with those vestibule frames on the rear of the tender in both the freight and the passenger service?

A. It is, yes sir.

Q. And this particular engine was so equipped then that it could be either used as a passenger engine or a freight engine?

A. Yes, sir.

Q. How long have you known Van Harris, Mr. Heintz?

A. Just from the day before was the first time I had ever seen him, the trip going south the day before.

Cross-examination by Mr. Fewell:

Q. Were you on the same side of the train — the conductor when you started up?

A. Yes, sir.

Q. You were behind him?

A. I was behind him.

116 Q. You told Mr. Bozeman you didn't notice any movement of the train at all?

A. None whatever.

Q. Was the train—was the engine coupled to it under its own brakes?

A. It was on a level track.

Q. It didn't have any brakes on it?

A. Not that I know of.

Q. Do you know of your own knowledge it didn't have any brakes on it?

A. It had brakes on it, but they were not set to my knowledge.

Q. The air brakes were not coupled unless the engine was coupled?

A. No, sir.

Q. As to whether the brakes were set or not, you don't know?

A. I don't know.

Q. How far were you behind the conductor?

A. He left the train ahead of me and I lit my lamps after he had gone and walked up the train toward him.

Q. How many engines have they got on the New Orleans & Northeastern Railroad?

A. Oh, I couldn't tell you the exact number.

Q. How many passenger engines?

A. I couldn't tell you the exact number.

Q. How many freight engines?

A. I couldn't tell you.

Q. You tell that jury that they use the same engine for passenger service that they do for the freight service?

A. He asked me if they used that class of engine.

Q. I didn't ask you that. I asked you if they use the same engine for freight service that they use for passenger service?

A. They use that class of engine.

Q. That particular engine, do they use it in the freight service?

A. In the freight service.

117 Q. Then you didn't mean to tell Mr. Bozeman it was customary for this Northeastern to use an engine equipped with a vestibule door at the back of the tank for freight service?

A. I did tell him that, in both services, freight and passenger service.

Q. What other engines have they got in the freight service?

A. They have got the 266, 500, 501, 502.

Q. That is four, isn't it?

A. That is five with the 365.

Q. That is all the engines they have got in the freight service equipped with the vestibules on the back of it?

A. That is five.

Q. That is all, isn't it?

A. I don't know.

Q. How many engines have they got?

A. I don't know sir; they have got about thirty I reckon.

Q. Those engines were bought for the passenger service weren't they?

A. I couldn't tell you.

Q. Do you know whether they were ever in the passenger service?

A. I know the 265 or 66, they are just like engines I have seen in the passenger service.

Q. What kind of engines are those?

A. Big, monkey motion engines we call them.

Q. Did you get them from the Baldwin Locomotive Works?

A. Yes, sir.

Q. All five of those engines were monkey motion engines?

A. Yes, sir.

Q. All five of those engines equipped with a vestibule end that are used in the freight service?

A. To my knowledge, yes.

Q. How long have you been running on this road?

A. Since September, 1910.

118 Q. You say you didn't know Van till the day before?

A. Day before.

Q. He went south with you?

A. Yes, sir.

Q. What sort of looking man was he?

A. He was a tall, light, yellow negro.

Q. Kinder heavy set?

A. No, medium build.

Q. I believe you stated you didn't know how he got caught under the engine?

A. I do not, no sir.

Q. Did you get up there before they moved the engine off of him?

A. No, sir.

Q. Did you get up there after they moved him out from under the engine?

A. I got up there after they had done coupled the engine back to the train after they had taken him away from there.

Q. You didn't get there while his body was there?

A. No, sir.

(Witness excused.)

GUS NELSON, (Colored), being first duly sworn, was produced and testified as follows, to-wit:

Direct examination by Mr. Bozeman:

Q. Where do you live Gus?

A. I live in New Orleans.

Q. New Orleans?

A. Yes, sir.

Q. Were you living there when Van Harris was hurt down there in New Orleans?

A. Yes, sir.

Q. What were you doing on that day?

A. Working.

119 Q. I mean at the time Van was hurt, what was your business?

A. I was washing lamp globes.

Q. What was your general business, what were you employed to do?

A. To help the cook.

Q. What were you working on? What kind of cook room? In a house or on the cars or where?

A. On the camp cars.

Q. What were those camp cars? Who were they used by?

A. W. A. Baker.

Q. By Mr. Baker?

A. Yes, sir.

Q. And the workmen — by him?

A. Yes, sir.

Q. They were for the workmen? Were they under him?

A. Yes, sir; Mr. Baker was the foreman of it.

Q. Do you know how many of those camp cars there were standing out there by where the boy was hurt?

A. No, sir; I don't know sir.

Q. Was there more than one?

A. Yes, sir.

Q. What was the car used for that you were in?

A. Cooking car.

Q. Who was the cook?

A. Will Davis.

Q. You say you were the cook's helper?

A. Yes, sir.

Q. Did you see Van Harris just before he was hurt?

A. Yes, sir.

Q. Did you see this engine when it was being backed down there to couple to this train?

A. Yes, sir.

Q. Where were you standing Gus?

120 A. In the car door.

Q. In what car door?

A. In the kitchen door.

Q. In the camp-car kitchen door?

A. Yes, sir.

Q. On which side of the camp car was this engine and tender?

A. On the west side.

Q. What side—did your camp car have a door on both sides?

A. Yes, sir.

Q. Which door were you standing —, which side?

A. On the west door, next to the train.

Q. You say you saw that train when it was backing down the track towards the train?

A. Yes, sir.

Q. Could you see who was handling the engine, who was operating it?

A. Yes, sir; the engineer.

Q. The engineer?

A. Yes, sir.

Q. Do you know who he is?

A. Mr. Fred Strobel.

Q. Did you see the fireman?

A. Yes, sir.

Q. Where was the fireman?

A. Sitting on the seat.

Q. In the engine?

A. Yes, sir.

Q. On the fireman's seat?

A. Yes, sir.

Q. Which side was Mr. Strobel sitting on, the engineer?

A. He was sitting on the east side.

Q. Which way was the engine headed?

A. North.

121 Q. Headed north?

A. Yes, sir.

Q. Which way was it backing?

A. It was backing south.

Q. When you first saw Van Harris where was he and what was he doing?

A. Hanging on the back end of the tender.

Q. The engine and tender?

A. Yes, sir.

Q. Hanging on the back end?

A. Yes, sir.

Q. *What* that while the engine was moving, backing down there?

A. Yes, sir.

Q. Was he doing anything or just hanging on there, just riding?

A. He was holding on to it, hanging on to it.

Q. Did he stay on there till the coupling was made in the train?

A. No, sir; he got down.

Q. Got down where?

A. On the ground off the engine.

Q. Got down on the ground?

A. Yes, sir.

Q. Did he get down on the ground before the engine stopped moving?

A. Yes, sir.

Q. About how far were you Gus in the car door where you were, how far were you from where this coupling was to be made where the engine and cars were coupled together?

A. About as far as from here to the other side *end* of that table.

Q. From you to the other side of the table?

A. Yes, sir.

Q. Far as from you to where Mr. Lees is sitting there?

A. Yes, sir.

122 Q. That is how far you were from it?

A. Yes, sir.

Q. How close had the engine got — the car, how far apart were the two ends, the end of the car and the end of the engine when Van got down?

A. Far as from here to you.

Q. Far as from me to you?

A. Yes, sir.

Q. So we can get it in there, how far would that be?

A. Five or six feet.

Q. How many steps from where you are to where I am?

A. About three or four.

Q. About three or four steps?

A. Ahead of the engine.

Q. I am talking about when he got down off—you say he got down off the back end of the tender?

A. Yes, sir.

Q. Did he get down on the ground or what did he get down on?

A. He got down on the ground.

Q. When Van got down on the ground, what I am trying to get

at now, how far was the engine from the car, the space between them?

A. It was as far as from here to Mr. Lees.

Q. Far as from you to Mr. Lees.

A. Yes, sir.

Q. What did Van do when he got down on the ground?

A. Gave them a signal to back up.

Q. State whether or not he gave them a signal to back up while he was hanging on the tender?

A. No, sir.

Q. Who did he give that signal to?

A. The engineer.

Q. After he got down on the ground, what did he do?
123 Did he stand there after he got down?

A. No, sir.

Q. What did he do?

A. Walked on back towards the train cars.

Q. Walked on back towards the car he was going to couple?

A. Yes, sir.

Q. Go ahead and tell the jury the next thing you saw him do?

A. The next thing I saw him do was he walked on back toward the head of the engine, and when he went to make the coupling I hollered to the fireman, and — I saw him again he was dragging on the track.

Q. Were you looking at him just at the time the engine and car came together?

A. No, sir; the engine was still moving when I saw him.

Q. When you last saw him the engine was still moving?

A. Yes, sir.

Q. You said something about him going between there, what did he seem to be doing?

A. Coupling up the air.

Q. How did he do to get at the air?

A. The engine was still moving and he stopped to catch the air that way.

Q. Stooped over?

A. Yes, sir.

Q. Between the engine and the car?

A. Yes, sir.

Q. When he stooped over that way to get the air hose had the engine ever stopped moving altogether?

A. No, sir.

Q. Had it got close enough to couple to the car at that time?

A. No, sir; it wasn't close enough. It hadn't stopped.

Q. You say you turned your attention from that to the fireman?

A. Yes, sir.

124 Q. What did you holler at the fireman about?

A. I hollered and asked him how -as my Uncle.

Q. Did you holler to him anything about Van?

A. No, sir; I didn't know he was going to couple it up that quick.

Q. Where was the fireman when you hollered at him?

A. Sitting down in the cab.

Q. Sitting in his seat?

A. Yes, sir.

Q. When you looked around again what position was Van in?

A. I couldn't see the body part of him. I just saw the legs dragging up the rail, one leg was on the outside and the other one was on the inside.

Q. How close were you now while you were standing in that door to this engine moving along there?

A. It was about ten feet.

Q. Where was the engine with reference to the car you were in? Suppose, for instance, this table was the cook car you were in, where was the door in the cook car, in the middle of it or at the end?

A. About the middle of it.

Q. On the side?

A. Yes, sir.

Q. Where was the engine with reference to this door while it was moving?

A. It was right straight across in front of the car about 10 feet.

Q. From where you stood in the door, in the middle of the car which way from you was the car that the engine was going to couple to?

A. Back that way.

Q. South of you?

A. South.

125 Q. Back this way? Which way did the engine come from?

A. Come from the north.

Q. Come from the north?

A. Yes, sir.

Q. When the engine stopped where was it with reference to your door here, I mean by that had it gone entirely by the door, or hadn't got to the door, or how was it?

A. It had gone by the door.

Q. It had gone by the door?

A. Yes, sir.

Q. Were you standing there where you could see the engine from the time that you saw Van Harris riding on the end of the train until you saw his feet dragging along there?

A. Yes, sir.

Q. The engine right before you all the time?

A. Yes, sir.

Q. State to the court and jury here whether it ever come to a dead stop or not between those times?

A. No, sir; it did not come to no dead stop.

Q. By looking towards that engine or out that way did you see a man standing over on the other side of the track the engine was running on, out there about opposite the end of this train?

A. No, sir.

Q. Do you know Dennis Thomas?

A. No, sir.

Q. You don't know him?

A. No, sir.

Q. Have you seen Dennis Thomas who was a witness here in this case?

A. I don't know him.

Q. You don't know him?

A. No, sir.

126 Q. Did you see any negro man with a blue jumper on or anything like that standing out there in the track just beyond this engine and train?

A. No, sir.

Q. Did you go out there where this man was?

A. No, sir.

Q. What did you do as you saw he was hurt there?

A. I stood in the door till I goes back to the stove.

Q. Did the engine finally come to a full stop?

A. After he was caught?

Q. Yes, after he was caught under there, did the engine stop?

A. Yes, sir.

Q. Where was the engineer when the engine stopped?

A. Sitting on his seat.

Q. Did you see the engineer when he got off his seat?

A. Yes, sir.

Q. Which side did he get off on?

A. He got off on the east side.

Q. That is the engineer's side?

A. Yes, sir.

Q. Did you see where he went?

A. He went back there to look for him.

Q. Did you see the fireman get off the engine?

A. Yes, sir.

Q. Which side did the fireman get off on?

A. Off on the engineer's side.

Q. What did he do?

A. Went back there to look for him.

Q. Was that fireman standing out there by the engine or any where around there with an oil cup in his hand when this boy got hurt?

A. No, sir.

127 Q. How fast was that engine moving as it came back to make that coupling?

A. Moving slow.

Examination by Mr. Fewell:

Q. Moving slow?

A. Yes, sir; just was moving.

Q. Just was moving?

A. Yes, sir.

Q. Did you make a statement to Mr. Seger about this thing? Do you know Mr. Martin Segar?

A. No, sir.

Q. You don't?

A. No, sir.

Q. Where do you live? New Orleans?

A. Yes, sir.

Q. Do you remember a man coming down to New Orleans to see you on the 20th day of March, 1914, and asking you about this thing?

A. It was at Derby, wasn't it?

Q. What?

A. It was at Derby, wasn't it?

Q. It was at Derby?

A. Yes, sir.

Q. Did he come to see you at Derby?

A. Yes, sir.

Q. You gave him a written statement about it didn't you?

A. Yes, sir.

Q. He wrote down what you said to him and you signed it, didn't you?

A. Yes, sir.

Q. Didn't you state in that statement that the engine came back strong—

Mr. Bozeman: We object to that. It seems it is a written statement, unless the witness has the written statement to see. We object to it as being incompetent.

The Court: I think that would be right Mr. Fewell, to let him see his statement.

Mr. Fewell: You stated to Mr. Segar how the thing happened didn't you?

A. Yes, sir.

Q. Didn't you tell me awhile ago you didn't know Mr. Segar?

A. The man what come to Derby, I didn't know that was him.

Q. The man what come to Derby?

A. Yes, sir; we were left New Orleans when he came there.

Q. You had left New Orleans when Mr. Segar came down there to see about it?

A. Yes, sir.

Q. And he found you at Derby, didn't he?

A. Yes, sir.

Q. And he asked you about it didn't he?

A. Yes, sir.

Q. And didn't you tell him when he asked you about the movement of that train, that that engine came back strong when it killed Van Harris?

Mr. Bozeman: We object to that, because the testimony shows the statement was reduced to writing and the writing is the best evidence of it.

The Court: Go ahead.

To which action and ruling of the court, the defendant then and there excepted.

A. I told him it come back.

Q. Can't you answer my question? Didn't you tell Mr. Segar when he asked you about the movement of that engine at the time it killed Van Harris that the engine came back to couple up strong?

A. I told him it come back moving slow.

Q. You told him it came back moving slow, did you?

129 A. Yes, sir.

Q. You stick to that, do you?

A. It was.

Q. I am not asking you about the fact now. I am ask you what you told Mr. Segar about it?

A. Yes, sir.

Q. Didn't you tell Mr. Segar that engine came back strong?

A. No, sir.

Q. You did not?

A. No, sir.

Q. You are willing to stick to that are you?

A. Yes, sir.

Q. Did you sign the statement Mr. Segar reduced to writing?

A. Yes, sir.

Q. You tell the jury, as I understand it, that the engineer and fireman both got off the east side of the train and went back to look for Van?

A. Yes, sir.

Q. The east side was the left-hand side wasn't it, facing this way?

A. Yes, sir.

Q. What?

A. On this dide.

Q. Was the east side the side the engineer was on or the fireman's side was on?

A. On the engineer's side.

Q. They got off on that side?

A. Yes, sir.

Q. Don't you know that that ain't a fact, and this is a fact that this engineer got off on the left-hand side of the engine and met his conductor some nine or ten box car lengths from the engine and told him about Van getting killed?

A. He got off on his dide of the engine and that was on the east side facing that way:

130 Q. On the east side facing what way?

A. North.

Q. I am not asking you that. I asked you if it isn't a fact you know the engineer got off on the west side of his engine on the fireman's side of his engine and walked back down to meet his conductor some eight or ten car lengths from the engine to tell him about it?

A. No, sir.

Q. You didn't see him then do that?

A. I didn't see him.

Q. But all you saw was he got off on your side of the engine?

A. Yes, sir.

Q. And went back to look at Van?

A. Yes, sir.

Q. That is right, is it?

A. Yes, sir.

Q. Did you see Mr. Charlie Strobel there at all?

A. Yes, sir.

Q. Where was he when you saw him?

A. He came around the engine.

Q. He came from over on the fireman's side of the train?

A. Yes, sir.

Q. And came around in front of the engine?

A. Yes, sir.

Q. Did he get up there before they moved the engine off of Van?

A. I don't know whether he come before they moved it off——

Q. Had the engine moved before you saw Mr. Strobel?

A. Yes, sir.

Q. Who moved it?

A. The engineer and one of the car knockers.

Q. The engineer according to your statement got off on his side and went back to look at Van?

131 A. Yes, sir.

Q. Van was under the rear wheel wasn't he?

A. Yes, sir.

Q. Did the engineer go back and get on the engine?

A. He didn't get off till he went back to look for him.

Q. He got off his engine and went back to look for Van before anybody knew he was caught, is that it?

A. When he seed nobody didn't give him no signal he got down to look for him.

Q. When he seed who didn't give him no signal?

A. Van.

Q. So Van had disappeared from the engineer's view, is that right?

A. Yes, sir.

Q. The engineer didn't know what had become of him?

A. No, sir.

Q. The train was still moving at that time?

A. Yes, sir.

Q. Then he stopped his train and he got off and went to hunt for Van?

A. When the train stopped he went to look for him.

Q. The engineer stopped it didn't he?

A. Yes, sir.

Q. And when he stopped it he got off and went to look for Van?

A. Yes, sir.

Q. And when he stopped it he got off and went to look for Van?

A. Yes, sir.

Q. What was that you hollered and asked the fireman?

A. How was my Uncle.

Q. He was on the opposite side from you wasn't he?

A. Yes, sir.

Q. Did you just holler from over here in the camp car across to the fireman? Or, where was he?

A. He was sitting on the seat box.

Q. Sitting up on the fireman's seat box?

132 A. Yes, sir.

Q. Was he right opposite you when the engine was stopped?

A. Yes, sir.

Q. And right opposite this door in which you were standing?

A. Yes, sir.

Q. Did you look at him through the engine cab?

A. Yes, sir.

Q. How long is the tender of that engine?

A. I don't know sir.

Q. Is it as far as from you to Mr. Lees—

A. The tender?

Q. Yes, the tender of the engine? You know what the tender of the engine is, don't you?

A. Yes, sir.

Q. What is it?

A. Where the coal and water is.

Q. How long is that?

A. It ain't as far as from me to Mr. Lees.

Q. You say it ain't as long as from you to Mr. Lees?

A. No, sir.

Q. How long is it?

A. About as far as from here to that book.

Q. This black book?

A. Yes, sir.

Q. Far as from you to here?

A. Yes, sir.

Q. Have you any idea how much water that tank will hold?

A. No, sir.

Q. That is your idea about how long it was?

A. Yes, sir.

Q. When you hollered to that fireman about your Uncle, you were to your left?

A. Yes, sir.

133 Q. And you were looking at him when Van got hurt?

A. Yes, sir.

Q. And Van Harris was back down yonder at the rear of that engine?

A. Yes, sir.

Q. Isn't it a fact you didn't see him get hurt?

A. When I saw him his feet were dragging.

Q. When was the last time you saw him before his feet were dragging? Was he just going in between the cars?

A. Yes, sir.

Q. And that is the last you saw of him till you saw his feet dragging?

A. Yes, sir.

Q. Do you know how he got killed?

A. No, sir.

Q. Do you know how he got under that wheel?

A. No, sir.

Q. Do you know how he got knocked down and rolling under this wheel?

A. No, sir.

Q. Did you tell Mr. Bozeman that Van was hanging on the engineer's side of the tank as the engine came backing along?

A. Yes, sir.

Q. Was he hanging with the handhold on the back of the tank?

A. Yes, sir.

Q. Where was his right foot?

A. On the step.

Q. On the step that hung at the rear end of the tank?

A. Yes, sir.

Q. He had his right foot in that—what sort of step is that?

A. Iron.

Q. What sort of handhold was this he had hold of?

A. Iron.

134 Q. He had his back to the engineer didn't he?

A. Yes, sir.

Q. Do you tell the jury he didn't make any signal to the engineer till he got down on the ground?

A. I didn't see him make any.

Q. The engineer was backing up already?

A. Yes, sir.

Q. The first time you saw him make a signal was while he was on the ground?

A. Yes, sir.

Q. You tell the jury he didn't make a signal to the engineer hanging on there to come on ahead?

A. He didn't make any while I saw him.

Q. He didn't make any till he got on the ground?

A. No, sir.

Q. What sort of signal did he make when he got on the ground?

A. Backing up.

Q. What was the use in making that signal when he got on the ground?

Mr. Bozeman: We object to that.

Sustained.

Q. You stated to Mr. Bozeman that engine was backing up when this negro got on this tank?

A. It was.

Q. You stated he didn't give the engineer any signal till he got on the ground?

A. He didn't.

Q. What sort of signal did he give when he got on the ground?

A. Back up.

Q. The engine was backing up then wasn't it?

A. Yes, sir.

- Q. It was still moving when he got off?
A. Yes, sir.
- 135 Q. Notwithstanding that he still gave them a backing up signal?
A. He was giving them the signal backing along.
Q. Was he walking along between the rails?
A. No, sir.
Q. Walking along on the outside of the east rail?
A. Yes, sir.
Q. How was he giving the signal to back up?
A. This way.
Q. With his right hand?
A. Yes, sir.
Q. Which was Van Harris Looking?
A. Looking back facing the car.
Q. Looking back towards where he was going to couple up to this box car?
A. Yes, sir.
Q. And walking back here giving them a back-up signal?
A. Yes, sir.
Q. Giving them a signal like that?
A. Yes, sir.
Q. What does that mean, Gus, in railroad parlance?
A. Back up.
Q. Back up how?
A. Slow.
Q. How far was the engine from the car when Van got off the engine?
A. He was far as from here to Mr.—
Q. Mr. Lees?
A. Yes, sir.
Q. And this man walked on giving his back-up signal with his attention on the front end of this car till the cars got mighty near together and he disappeared from you?
A. Yes, sir.
Q. And that is all you know about it, ain't it?
A. Yes, sir.
- 136 Q. You don't know and can't undertake to tell that jury how Van got killed can you?
A. No, sir.
Q. And you won't undertake it, will you?
A. No, sir.
Q. What position was Van in when you last saw him just going in between these cars? What position? Was he standing upright?
A. Standing in this position and kinder leaning over.
Q. He was leaning over between the cars the last you saw of him?
A. Yes, sir.
Q. About in this position?
A. Yes, sir.
Q. That is the position you saw him in last?
A. Yes, sir.

Q. Did you ever see him get ahold of any of the air hose?

A. No, sir.

Q. So far — you know he never got any did he?

A. No, sir.

Q. The air hose on that 'front car was over on the other side from where he was wasn't it?

A. Yes, sir.

Q. The one on the engine was on his side, wasn't it?

A. Yes, sir.

Q. When these cars come together, they couple automatically don't they, something in that shape, come together and clamp?

A. Yes, sir.

Q. There is no necessity for a man to go between the engine and the car to make the coupling of the drawheads is there?

A. I don't know.

Q. If they couple automatically what is a man to go in back there for?

137 A. If there is anything the matter with them back there they don't.

Q. And when they are in good shape, the engine coming back they couple up together don't they?

A. Yes, sir.

Q. And all they have to do is to get that engine to go ahead is to couple up the air hose?

A. Yes, sir.

Q. Which way was Van?

A. He was stooping down this way.

Q. The next time you saw him he was under the last wheel of the tank?

A. Yes, sir.

Q. And the engineer had got down off the engine?

A. Yes, sir.

Q. And was looking for Van?

A. Yes, sir.

Q. Did you hear the engine give any signal?

A. The engine wasn't steaming. If it did, I didn't hear it.

Q. What do you mean by steaming? Popping off?

A. Yes, sir.

Q. Did you hear any tooting of the engine?

A. No, sir.

Q. Mr. Strobel was sitting on his engine looking back the way he was going, wasn't he?

A. Yes, sir.

Q. Wasn't he standing up here with his hand on his throttle easing it along to make that coupling?

A. He was sitting this way, with his back towards the north.

Q. You say he was sitting in his seat there?

A. Sitting or standing one, O couldn't see his legs. I could only see his back.

Q. But he had his face that way, his hand on the throttle?

138 A. Yes, sir.

Q. And he lost Van?

A. Yes, sir.

Q. When the cars came together, how long after those cars came together was it before Mr. Strobel got off his engine and went back to look for Van?

A. I don't know, sir, how long.

Q. How did he know anything had happened to Van?

A. He went back to look for him; he didn't know.

Q. And nobody had hollered at all?

A. No, sir.

Q. Nobody had hollered, "You have killed a negro" or "A man under the train?"

A. No, sir.

Q. So far as you know, nobody had seen anything?

A. No, sir.

Q. And he just gets off his engine and goes around here to look for this man?

A. Yes, sir.

Q. You saw him all the time, didn't you, under this wheel?

A. I saw his legs.

Q. Why didn't you tell the engineer "There he is under there?"

A. I didn't see him till he got down to look for him.

Q. Did you see him before the engineer found him?

A. No, sir; I seen his leg before the engineer did.

Q. You knew it was a man's leg didn't you?

A. Yes, sir.

Q. Why didn't you tell the engineer there was a man under there?

A. I say I hollered. He couldn't have heard it.

Q. I thought you said you were talking to this negro fireman?

A. I was talking to him about my Uncle Willie Crewell.

Q. Were you talking to him when the engineer went back to find this man?

A. I was hollering to him when the cook, Mr. Davis hollered to him there he was.

139 Q. He was the man pointed out where this man was, wasn't he?

A. Yes, sir.

Q. I thought you said nobody told the engineer?

A. He told me. He didn't holler at the engineer.

Q. Didn't that sound loud enough to attract the engineer's attention?

A. No, sir.

Q. Was the engineer still standing?

A. Yes, sir.

Q. Was the engineer still on the engine?

A. Yes, sir. The engine hadn't stopped.

Q. Had it hit these cars?

A. It had hit them but it hadn't stopped I don't reckon. It was moving back. I don't know.

Q. I don't want you to reckon about this thing. I want you to tell me the facts about this thing. You tell this jury that

this engine was still moving when this man saw the legs of the dead man under the rear trucks of this tank?

A. Yes, sir.

Q. And he hollered, "there is the man under the tank"?

A. Yes, sir.

Q. Who attracted Mr. Strobel's attention?

A. Nobody.

Q. Did the engine just keep on moving with the cars?

A. Yes, sir.

Q. How far did the engine and cars move after they coupled up, Gus?

A. About four or five feet.

Q. Four or five feet?

A. Yes, sir.

Q. In other words, when they went together to couple up, the engine just kept on shoving along four or five feet?

A. Yes, sir.

140 Q. It is true that this man's body was under the rear trucks of the engine when they stopped?

A. Yes, sir.

Q. How far were those wheels from the back end of the tender or tank?

A. I don't know.

Q. Three or four or five feet?

A. From where he started?

Q. Yes?

A. Yes, sir.

Q. Gus, I don't know as I understand you fully, I want to understand you fully and want you to be clear about it. I understand you to say that after this man got under this engine that the engine was still moving on further south in the way that they had coupled up some four or five feet, is that right?

A. Yes, sir.

Q. And that then it was that the engineer without anybody saying there is anybody under there, or anything of that kind, stopped?

A. Yes, sir.

Q. And he then got out there to look for Van?

A. Yes, sir.

Q. How many cars were in this train?

A. I don't know sir.

Q. Do you know whether they were loaded?

A. No, sir.

Q. Do you know how far the caboose lights set down the track?

A. No, sir.

Q. Did you look down there at all?

A. No, sir.

Q. Did you ever get your mind off your Uncle long enough to look back toward the rear of the train?

A. No, sir.

141 Q. Your mind still stayed on your Uncle?

A. Not afterwards.

Q. Did you know Van pretty well?

A. No, sir.

Q. How long had you known him?

A. I didn't know him.

Q. You didn't know him at all?

A. No, sir.

Q. Which one of his legs was it that the wheel rolled up on and stopped on? Which one of his legs?

A. On this one.

Q. On the right one?

A. Yes, sir.

Q. He was laying with his head toward the front of the engine wasn't he?

A. No, sir; laying with his head back toward the car; he was laying with his back this way.

Q. Yes, I am confused and not you. He was laying with his feet toward the front of the engine the way the engine was going?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Which one of his feet was it the wheel mounted and rolled?

A. That one.

Q. The right one?

A. Yes, sir.

Q. It rolled up his right leg?

A. It rolled up his leg, I didn't see it. I saw his right leg over the east rail.

Q. You say his right leg over the east rail?

A. Yes, sir.

Q. Over the inside of the rail or outside?

A. This one was on the inside and this one was on the outside.

142 Q. The right one was on the outside of the rail?

A. Yes, sir.

Q. And the left one was on the inside toward you, that right?

A. Yes, sir.

Q. Which wheel stopped on him?

A. I didn't see it stop on him.

Q. Didn't you look down there at all?

A. I looked at the trucks.

Q. You saw him then didn't you?

A. Yes, sir.

Q. Didn't you notice then whether the wheel was on him then or not?

A. No, sir.

Q. You didn't notice?

A. No, sir.

Q. Assuming that that is the front of the engine?

A. Yes, sir.

Q. Your camp cars over here, here is the east rail and here is the west rail of this track?

A. Yes, sir.

Q. Van Harris' body was lying on the east rail of that track with his head the other way wasn't it?

A. Yes, sir.

Q. Didn't you tell me awhile ago that it was Van's right leg the wheel had rolled up on?

A. The way you were standing.

Q. The way I was standing. I am talking about as a matter of fact, Gus, which leg was it the wheel rolled on?

Q. It was this leg with his face turned towards the engine.

Q. Come around here a minute. This man Van was laying sorter back this way?

A. Yes, sir.

Q. He was facing yonder way?

143 A. Yes, sir.

Q. Which one of his legs was on the outside of the rail?

A. This one.

Q. The right one?

A. Yes, sir.

Q. Then the leg the wheel rolled up on was which leg?

A. This one.

Q. The same leg?

A. Yes, sir. Laying across the leg.

Q. That yonder leg was laying across the rail?

A. Not exactly across it. I- was laying up this way and the wheel run sorter up on it.

Q. I thought you said awhile ago one of his legs was laying on the outside of the rail and one on the inside?

A. This one was on the outside and this one was between the rail, there were two.

Q. That wheel rolled up the leg that way?

A. Yes, sir.

Q. Most of his body was between the rails wasn't it?

A. Yes, sir.

Q. Was he grabbing for anything to save himself?

A. I couldn't say.

Q. He didn't make any outcry at all?

A. I didn't hear him.

Q. Did you hear him make any cry of pain?

A. No, sir.

Q. You were still talking about your Uncle?

A. I had quit talking about my Uncle. I couldn't hear for the steam.

Q. That the reason you quit talking?

A. Yes, sir.

Q. Did he make any effort or scramble or anything that you saw?

A. No, sir.

144 Mr. Bozeman: You are not a brakeman are you Gus?

A. No, sir.

Q. Have you ever worked with a brakeman?

A. No, sir.

Q. Never had any experience in coupling or uncoupling cars or working on trains like that?

A. No, sir.

Q. Just a cook?

A. Yes, sir.

Q. You don't know anything about the length of trains or engines or anything of that kind?

A. No, sir.

Q. Never had anything to do with anything of that sort?

A. No, sir.

(Witness excused.)

Mr. GEORGE C. GUERIN, being first duly sworn, was produced and testified as follows, to-wit:

Direct examination by Mr. Bozeman:

Q. Where do you live Mr. Guerin?

A. 2504 Burgundy Street.

Q. New Orleans, La.?

A. Yes, sir.

Q. How long have you lived there?

A. Six years.

Q. What business are you in now, Mr. Guerin?

A. My business is car repairing right now, sir, Northeastern Railroad.

Q. For the New Orleans and Northeastern Railway?

A. Yes, sir.

Q. New Orleans?

A. Yes, sir.

145 Q. Were you working for the New Orleans and Northeastern on or about the fifth day of February, 1914, when this colored brakeman was killed there in the yards there?

A. Yes, sir; I was acting inspector.

Q. Were you inspecting this train that was then being made up?

A. Yes, sir.

Q. That was making this coupling?

A. Yes, sir.

Q. What was the first you knew of Harris being hurt?

A. Well, sir, I will give you my statement. It was about five or ten minutes after, which I had marked in my book as a rule for us to when the engine is attached to a train or when they are coming from a train—to the train.

Q. Never mind about the rule.

A. All right, about the rule. I will cut the rule out. And I left my train. The engine was not there yet. The train was made up, sir. I went on to what you call our office, our north-end yard office to get a wrench which we use on the trains to come down on the air.

Q. To test the air?

A. Yes, sir; to test the air. I had my wrench walking toward

from the north end to the engine. I seen Mr. Strobel, the engineer, toward the west side, going down toward the south end. He sighted me and called me. I walked to him and asked him what was the matter. He says, will you pull this lever on this engine—

Mr. Fewell: Hold on. Hold on. All right; go ahead.

A. I am just stating this statement to you as I saw it.

Q. What did the engineer say to you?

A. He asked me would I pull that lever up.

Q. What lever was that?

A. On the engine, of the water tank.

Q. What side were you on.

146 Q. *What side were you on?*

A. I was on the west side, sir.

Q. Did you agree to do that?

A. I did, sir, immediately.

Q. Was that Mr. Strobel's engine he was operating?

A. Yes, sir.

Q. Had that engine already been coupled to the car? Was it then coupled to the car?

A. Already coupled, yes sir.

Q. You were then on the west side?

A. Yes, sir.

Q. Where was it Mr. Strobel, the engineer, met you? Did he go beyond the engine?

A. He was coming from the south end. He met me near his engine.

Q. Were you coming from the north end?

A. From the north end, yes sir.

Q. At the time he asked you to lift that lever did you up to that time know that Van Harris was hurt?

A. No, sir; I did not.

Q. What did Mr. Strobel do when he asked you to lift the lever?

A. He mounted his engine and got in the cab.

Q. Did you lift the lever?

A. I did, sir.

Q. What did Mr. Strobel do?

A. He pulled the engine from the man's body.

Q. Where was the man lying? What rail?

A. On the rail to the east side.

Q. Which way was his head lying.

A. Towards the south, sir.

Q. Do you remember how his feet were laying?

A. Yes, sir; straddle like over the track. Just like I am sitting here, between the rail.

Q. The east rail?

147 Q. How far did they pull the engine?

A. How far did they pull the engine from the body?

Q. Yes, sir?

A. About five or six feet, sir.

Q. When he pulled the engine off of him there was he unconscious or conscious?

A. Unconscious, sir; certainly, yes sir.

Q. Did you help put his body in the car?

A. I did, sir.

Q. That was a freight car brought there to put him in to take him—

A. Switch engine and box car, yes sir.

Q. After his body was put in the box car did you make any examination of the couplers on that car?

A. Yes, sir; immediately.

Q. State to the court and jury what was their condition as to whether they were in good repair or not?

A. Yes, sir.

Q. They were?

A. Yes, sir; they were in first-class condition.

Q. What kind of couplers were they, whether they were automatic couplers or not?

A. Yes, sir; they were standard.

Q. Was there anything the matter with them?

A. No, sir.

Q. Did you make any experiment with those couplers to see whether or not they would couple automatically or not?

A. Yes, sir. We did.

Q. What did the experiments show?

A. The car was uncoupled already from the body. The engine was ordered to couple up by Mr. Charlie Strobel, the conductor. We coupled it up. It was all right. He said take them apart sir. We took them apart. Backed down again, coupled again, never failed.

148 Q. Was it necessary to go in between that engine and car to uncouple or couple that engine and car?

A. No way whatsoever, sir; the engine worked automatically from the outside. You pull the lever, the knuckle flies open sir.

Q. Was there a vestibule frame on the back end of that engine?

A. Yes, sir.

Q. What is that vestibule for?

A. For passenger trains, they use them for passenger trains.

Q. State whether or not they use those engines interchangeably for passenger trains or freight?

A. Or freight, yes sir.

Q. About what size is that frame?

A. It is about three feet over the water tank, sir.

Q. You mean it projects?

A. From the top of the water tank, yes sir.

A. Look at that door over there behind you?

A. Yes, sir; about two feet higher than that frame.

Q. How is that fastened to the back of the tank?

A. It is riveted.

Q. Is it so fastened or put on there so that you can take it off when you want to use it on a freight train or take it up when you want to

use it on a passenger train, or is it a permanent part of the engine?

A. No, sir; it is put there to stay there.

Q. Did you examine those air hose between the engine and cars?

A. Yes, sir.

Q. State whether or not they were in good condition?

A. All good condition, yes sir.

Q. Was there anything the matter with those knuckles?

A. Nothing at all, sir.

Q. State whether or not the handhold and other safety appliances about that engine and about that car were in good condition?

149 A. Yes, sir; both were in a standard condition; engines are generally inspected from the round house and on trains,

sir.

Q. Did you inspect it there again after this man was injured?

A. Yes, sir.

Q. And inspect the car again?

A. Yes, sir.

Q. Was there anything on the track about there where this man was injured, Mr. Guerin, that would cause him to stumble and fall in through the chute there.

A. No, sir; the earth and the ties were right even. The ties weren't sticking up at all, sir. The ties were right level with the ground, sir.

Q. You didn't see the accident?

A. No, sir; I did not.

Q. When you were coming from north of the train down there to where this man was hurt there, state whether or not you saw a negro man with blue overalls on and a blue jumper or anything, standing right opposite the end of these cars on the side track west of the next side track west of this?

A. Any one standing around?

Q. Yes, sir.

A. No sir; there was no one standing around because we were looking for help.

Q. Looking for help?

A. Yes, sir.

Examination by Mr. Fewell:

Q. Did you help take the body from under the engine?

A. Yes, sir; I did.

Q. What did you put it on?

A. Put it on a ladder, sir; ladder and two boards laid on the ladder sir.

Q. Who helped you do that?

A. A train crew, sir.

Q. Who was the train crew that helped you?

150 A. A gentleman by the name of Mr. Paul Ophelia.

Q. Paul Ophelia?

A. Yes, sir. He is a switchman.

Q. That is one man?

A. Yes, sir; Paul Ophelia, that is one man.

Q. Who else.

- A. Johnny Short, the yard-master.
Q. Who else?
A. I can't think. There were one or two others.
Q. All white men?
A. Yes, sir.
Q. No darkey helped you whatever?
A. No, sir; no darkey helped us at all.
Q. You tell the jury no darkey helped you put him on there?
A. I don't remember seeing one around there, sir.
Q. The fact that you don't remember it don't satisfy me. You can't remember whether there was one around there or not?
A. I remember the four of us; this was a train crew; this was a switch engine.
Q. You can't remember whether there was anybody else around there?
A. They came around there after when the planks were put on the car.
Q. They came around there then?
A. Yes, sir.
Q. Do you remember them helping you put this body in the car?
A. I don't remember them helping us. There was one darkey there with a *slosh* hat and a pair of blue overalls.
Q. He came there did he?
A. Yes, sir; he came there after everything was over.
Q. He got in the car didn't he?
A. I don't remember seeing him get in the car.
Q. Who did get in the car with the man?
151 A. Three of the train crew.
Q. What members of the train crew? Was Ophelia along there?
A. Paul Ophelia, yes, sir, and Johnny Short and I can't exactly remember the other man's names. I know him when I see him, but I can't think of his name.
Q. Johnny Short was not a member of that train crew was he?
A. Yes, sir; the yard-master.
Q. That what you speak of a train crew?
A. He was with the gang.
Q. What makes up a train crew?
A. Three men is a gang.
Q. That is made up of the yard-master and——
A. Ophelia.
Q. Ophelia?
A. Yes, sir; he is one.
Q. And who else?
A. I can't think of their names.
Q. Didn't Mr. Charlie Strobel help you put the body in the car?
A. I don't exactly remember.
Q. Ain't it a fact Charlie Strobel went off to phone for the ambulance?
A. I guess he claims——
Q. Don't tell what he claims. I want your testimony?

A. I don't know whether he went in the car or not, sir. I never took no notice. I never belonged in that car. I belonged on that train. They couldn't move till that train left the yard?

Q. You had to inspect that train?

A. I have to stay there, I couldn't leave.

Q. That is what I asked you. You had to inspect that train?

A. Yes, sir. I had to stay there. I couldn't move.

Q. You all put the body on the ladder?

A. Yes, sir.

152 Q. And you all put the ladder in the box car?

A. And shoved the body right in the car on the ladder and I left right there and I came to my train.

Q. You say there was a darkey there that got in the car?

A. No, sir; I didn't see no darkey get in the car. There was a darkey around with blue overalls and a black hat. I don't know where he disappeared. I didn't see him any more.

Q. He didn't get in the car?

A. I don't know whether he got in the car or not. I couldn't tell you that. I put the body on the ladder and shoved it in the car, and went on to my train.

Q. Who was in there when you put the body in there?

A. I couldn't tell you any body except this man Ophelia.

Q. Who was this man Ophelia?

A. He was a switchman.

Q. He wasn't a member of that train crew?

A. He came there with that gang what brought the box car there to put the body in.

Q. He was a member of the switch engine crew?

A. Yes, sir.

Q. You don't know whether there was anybody else in the car or not?

A. There was some in the other end, but I didn't pay no attention to them.

Q. Just as you shoved it in you turned off?

A. I turned my back and went right on off.

Q. You came from up north didn't you?

A. I came from north, yes sir.

Q. Which side of the engine did you come on?

A. On the west side.

Q. That is the fireman's side, ain't it?

A. That is the fireman's side, yes sir.

Q. How far did you get from the engine before you met Mr. Strobel?

153 A. I was about even with the engine.

Q. Even with the engine you think?

A. Near the tank.

Q. Where was the engineer when you saw him?

A. He was on the west side going down towards the south.

Q. He was going away from his engine?

A. Yes, sir.

Q. And toward the caboose of the train?

A. Yes, sir.

Q. And he was on the fireman's side?

A. On the fireman's side, yes sir.

Q. Did you notice any movement of the engine there at all?

A. I was not there to see that.

Q. You weren't in sight of the engine when it coupled up?

A. No, sir.

Q. You didn't see that?

A. No, sir.

Q. You saw the engineer going away from the engine and towards the caboose.

A. Yes, sir.

Q. Did you see him when he turned?

A. Yes, sir.

Q. How far down the train was he from the engine when he turned?

A. About five car lengths from the engine.

Q. Did he meet anybody down there?

A. No, sir; he hollered to his brother.

Q. What did he holler to his brother?

A. He said, Oh Charlie——

Mr. Bozeman: Don't tell that; we object.

Q. He said something to the conductor, his brother, didn't he?

A. Yes, sir; he couldn't say much though, for his brother was too far.

Q. I never asked you whether he said much or not. He said something didn't he, and then you saw him turn wasn't it?

154 A. All he said was "Charlie."

Q. I never asked you what he said. I told you three times I never asked you what he said. He said something to his conductor, didn't he?

A. Yes.

Q. Why couldn't you say that at first?

A. I wanted to tell you just what he said.

Q. You saw the engineer turn five or six box car lengths from the engine?

A. Yes, sir.

Q. He turned around and started back toward you?

A. Yes, sir.

Q. You are a car inspector?

A. Yes, sir.

Q. What is the average length of the average car that was in that train?

A. Forty feet.

Q. Forty feet?

A. Yes, sir.

Q. And you say he was how many cars down the train, the engineer, when you saw him turn?

A. About five or six feet, five or six cars.

Q. If it was five cars it would be 200 feet approximately?

A. Yes.

Q. If it was six cars be 240 feet approximately?

A. Yes.

Q. About how long is the tender on this engine, approximately?

A. The tender on the engine is about ten feet.

Q. About what?

A. Ten or twelve foot, the water tank.

155 Q. I am talking about the tender, that is off of the engine, the engine proper and the gang-way and the tank?

A. Yes, sir; engine and the tank.

Q. The engine coupled to the tank?

A. Yes, sir; water tank.

Q. About how long is that tank?

A. That tank is about 12 foot, sir.

Q. About 12 feet?

A. Yes, sir; from the engine.

Q. You understand I am asking about the length of the engine tank?

A. Of an engine tank, yes sir.

Q. It is about 10 or 12 feet?

A. Yes, sir.

Q. That is how long it is?

A. Yes, sir.

Q. How long is the engine proper?

A. With the tank?

Q. Yes, sir.

A. I will give you a rough guess at that.

Q. Was the other a rough guess.

A. No, sir; as close as I could.

Q. Give us some idea of the length of the engine?

A. About 15 or 16 feet.

Q. Your idea is that an engine from stem to stern is about 27 feet long?

A. No, no.

Q. Ain't it a fact, Mr. Guerin, that a locomotive from the end of the cow-catcher to the end of the tank is 50 odd feet long?

A. Fifty or sixty, yes, sir, from the tank and the engine. All engines are not so long.

Q. What about this one? How long is the engine?

A. I told you 15 or 16 feet.

Q. You also told me that the tank was 10 or 12 feet?

156 A. Yes, sir.

Q. That makes 28 feet?

A. Yes, sir.

Q. And that engine and tender is 50 to 60 feet?

A. Yes, sir; every bit of it. I never measured one of them. I am not supposed to know.

Q. You told me you would give me the length of the tank?

A. We all know that an engine is longer than a box car, longer all the time.

Q. Yet your guess was the tank was ten or twelve feet for the tank and 15 to 16 feet for the engine?

A. Yes, sir; I am way out on that.

Q. You are way out on that aren't you?

A. Yes, sir.

Q. Was it dark at that time?

A. No, sir; it was day time.

Q. Was there a headlight on the engine?

A. I didn't take notice of that.

Q. You were facing the engine weren't you.

A. Yes, sir.

Q. What sort of headlight is that engine equipped with?

A. Electric.

Q. You say you didn't take any note of that electric headlight?

A. No, sir.

Q. Don't it shine for a long distance?

A. Oh, but I think it was too soon in the evening to put that light on. To take notice that the light was on, I did not take notice.

Q. When you first came in sight of the engine, how far were you from it approximately?

A. When I first seen the engine?

A. Yes.

157 A. As soon as I first left the back yard the engine was out there, coupled up.

Q. Did you come down the track or did you come across the track any distance from the engine?

A. I had to cross over.

Q. From where you struck the track was about what distance from the engine?

A. About twelve feet.

Q. The engine didn't move after you come in sight of it?

A. Me, oh, no sir. She was done already coupled up.

Q. Did you see Mr. Fred Strobel get off his side of the engine and walk off back towards the back end of the tank and look around under the wheels for a dead negro?

A. No, sir.

Q. When you saw him he was off on the other side?

A. He was on the west side when I seed him.

Q. On the fireman's side of the engine?

A. Yes, sir.

Q. And some five or six car lengths down the train?

A. Five or six car lengths from the engine.

Q. And when you saw him he was going from the engine?

A. He left the engine, yes sir.

Q. Where was his fireman when you came to the engine?

A. Sitting up in the cab.

Q. Did you notice whether he was awake or asleep?

A. He was awake all right.

Q. Which way was he facing?

A. He was facing down towards south end, yes sir.

Q. Looking back toward the back end of the train?

A. Yes, sir.

Q. He was a darkey wasn't he?

A. Yes, sir.

Q. Was he just sitting up on the seat box there?

158 A. Sitting up on the seat, yes sir, where he should be.

Q. Of course we know they never get where they don't belong.

Mr. Bozeman: We object to that.

Mr. Fewell: Well, I will withdraw my remark and we will cancel and get even again.

Q. When did the engineer Mr. Guerin tell you he wanted you to help uncouple that engine and get it off the man?

A. When I was right near the water tank?

Q. You were right near the back end of the water tank?

A. Yes, sir; I wasn't at the end. I was near the water tank between the engine and the water tank.

Q. How far was Mr. Strobel from you when he advised you somebody was under the engine and he wanted you to life the lever up?

A. He walked right up to me.

Q. Didn't you hear him tell his brother somebody was under the engine?

A. No, sir.

Q. When he walked to the other part of the engine he told you that he——

A. No, sir; he came to me first. He walked up to me.

Q. When he walked back up to you where you were?

A. He was six cars from the water tank, sir.

Q. He was six cars from the water tank when he first told you anything?

A. Yes, sir.

Q. What did he say?

A. He walked up to me.

Q. Hold on man. You have got him six cars from you. Did he say anything to you six cars from you?

A. No, sir; he walked up to me at your water tank.

Q. What did he say?

A. He asked me would I pull that lever up.

Q. He told you what was the matter?

159 A. Yes, sir.

Q. He knew it then didn't he?

A. Yes, sir.

Q. Didn't you tell that jury—what is that? Club?

A. That is a lift-lever.

Q. Didn't you tell that jury that those things worked automatic?

A. I didn, yes sir; work automatic on the box car.

Q. Do you know what automatic means?

A. Yes, sir.

Q. What does automatic mean?

A. Works automatic without in danger.

Q. You are talking about the coupling?

A. Yes, sir.

Q. Didn't you tell the jury awhile ago those levers worked automatic?

A. Why sure; we call them automatic.

Q. Didn't you have to lift them up with your hand?

A. Yes, sir.

Q. I am not talking about the coupler?

A. We call them all in one.

Q. Didn't you tell the jury they worked automatically?

A. Yes, sir.

Q. You have to take your hand to lift them?

A. You turn the rod and a knuckle opens, flies open without your getting between the cars.

Q. The lifting of the pin throws your knuckle open don't it?

A. Yes, sir.

Q. While you and the engineer were talking there at the back end of this tank was the fireman still up in the engine on his seat box?

A. The fireman was in the engine on his seat and the engineer just asked me to pull the lever and he got on his engine.

Q. You don't know whether the fireman stayed on his seat box or not?

160 A. Yes, sir; he stayed on his seat box.

Q. He did stay on his seat box?

A. Yes, sir.

Q. Where were these camp cars?

A. They were on track 12 east, opposite it.

Q. How many tracks was that opposite the track this train was on?

A. That is from two to twelve.

Q. That is eight tracks?

A. Yes, sir. But they are very close, you know. They meet on the north end.

Q. You tell the jury there were eight railroad tracks between this train where Van Harris was killed and these camp cars?

A. Between?

Q. Yes?

A. No, sir.

Q. How many tracks between there?

A. There is one track there that leads the switches.

Q. There is only one track there?

A. That leads the switches.

Q. The track between the track the train was standing — and these camp cars.

A. Camp cars twelve east, yes sir.

Q. How wide are those tracks?

A. Tracks are about five and one-half feet.

Q. What is the gauge of a track?

A. About five and one-half feet, approximately five and one-half feet.

Q. Yes, what is the distance between rail to rail between tracks?

A. I guess about four feet.

Q. That would be a distance then to this track the camp cars were on of nine and one-half and four?

A. Yes, sir.

Q. 13½ feet?

161 A. That is right opposite.

Q. Did you hear anybody holler there over there in that camp car when you walked up?

A. No, sir.

Q. You didn't hear anybody holler' at all?

A. No sir; no one hollered.

Q. Now, Mr. Guerin, isn't it a fact when you walked up there that this fireman and a negro over there in the camp car were talking across the cab of the engine and hollering at one another?

A. Hollering at each other?

Q. Yes, sir?

A. No, sir; I don't know nothing about it.

(Witness excused.)

Mr. W. P. BRANDIN, being first duly sworn, was produced and testified as follows, to-wit:

Direct examination by Mr. Bozeman:

Q. Where do you live Mr. Brandin?

A. New Orleans.

Q. What is your business?

A. Civil engineer.

Q. Employed by the New Orleans and Northeastern Railroad?

A. Yes, sir.

Q. Were you in February of this year?

A. Yes, sir.

Q. Did you make some measurements of the distances out there in the north yard at New Orleans, La., where this man Van Harris was hurt?

A. Yes, sir.

Q. In February. Did you make a drawing of that, blue print showing how the tracks lay and where the cars were situated?

A. Yes, sir.

162 Q. Look at this blue print which I now hand you and state if that is the drawing that you made of the location there?

A. Yes, sir; that is it.

Q. Now, what is there on this blue print that indicates the place where Van Harris was found?

A. "X."

Q. I see you have got marked on this blue print here certain tracks; for instance, main line N. O. & N. E., track No. 1 east, track No. 2 east, track No. 3 east, are those the names by which those particular tracks are known there in the yards?

A. Yes, sir.

Q. Now, I see along on the easter-most track here you have got certain cars blocked off there, N. O. & N. E. 14444 and so forth, in-

cluding car N. O. & N. E. 15859. What was that Car N. O. & N. E. 15859?

A. Kitchen car.

Q. Car where the cooks did their cooking?

A. Yes, sir.

Q. Were these cars standing just where you have got them shown on the map when you made these measurements?

A. Yes, sir.

Q. When were these measurements made by you with reference to the time Harris was injured?

A. No, sir; next morning, nine fifty-five.

Q. How did you ascertain this point here you have got marked with an "X" as the point where Van Harris was found?

A. By some blood.

Q. Where was that blood?

A. On the cinders.

Q. On the cinders?

A. Yes, sir.

Q. I see you have got indicated here just north of that point engine 265 and just south of it C. M. & St. P., is that 65—

A. C. M. & St. P. 65018.

163 Q. Was that engine and car standing there when you made the measurements?

A. No, sir.

Q. You just put them on the map there on each side of this point where Harris was killed?

A. Yes, sir.

Q. Does this map show correctly how the tracks are situated there?

A. Yes, sir.

Q. And the distances they are apart?

A. Distances apart.

Q. What is the distance from the west door of the cook car N. O. & N. E. 15859 straight across to an engine, assuming that the engine was standing on track No. 2?

A. I can scale it and tell.

Q. Scale it and tell us what the distance is.

A. Twenty-six feet.

Q. So a man standing in the door, the west door of the cook car would be how far from an engine across on this track No. 2 east?

A. Twenty-six feet.

Q. Measuring from the same door to the place where you found the blood on the cinders there that you have got marked as the place where Van Harris is found, how far is it from that door straight across to that point?

A. Forty-seven feet.

Q. How many tracks are there in between track No. 2 east where this blood was found and the track on which this cook car stood, measuring straight across from the cook car where the engine is indicated?

A. That would be the ladder track and half the gauge of the lead.

Q. You mean there would be a track and a half in there?

A. Yes, sir. Here is the block in here and here is the frog, that would make it about half the distance in there.

164 Mr. Bozeman: I will ask you to have this blue print identified as Exhibit 1 to your testimony, and we offer that in evidence.

Which said paper was identified by the Stenographer as Exhibit 1 to W. P. Brandin's testimony, and the same is in words and figures, as follows, to-wit:

The Clerk will here insert said Exhibit 1.

165 Q. Which direction is north on this map Mr. Brandin? Is it indicated there by anything?

A. Yes, sir; the arrow points north.

Q. What is this arrow on the main line?

A. Yes, sir.

Examination by Mr. Fewell:

Q. Mr. Brandin, the blue print that you present here does that show all the tracks in the north yard there?

A. No, sir.

Q. Is it not intended to show all the tracks west of where this accident occurred?

A. No, sir; not west.

Q. Does it show all the tracks east of where the accident occurred?

A. No, sir.

Q. How many tracks east of where the accident occurred as a matter of fact?

A. East of where the accident occurred?

A. Yes, sir; on the engineer's side of the train?

A. There is two further east there. They weren't there at the time the accident happened. They were only building at that time.

Q. Were these the tracks placed here at the time of the accident east of the accident?

A. Yes, sir.

Q. How many west of the accident at that time?

A. There was a ladder track and probably eleven or twelve others. Not at this point.

Q. There is approximately eleven or twelve tracks not shown by this blue print on the west side and where the accident happened?

A. No, sir; not eleven or twelve west of where the accident happened. About the same number over here, say two or three over there.

166 Q. Be two or three opposite the track?

A. About the same number as here.

Q. Did you put the picture of the engine on there?

A. Yes, sir.

Q. What is the scale of your map?

A. Twenty feet to the inch.

Q. Measure that engine and see how long that would show according to your scale?

- A. Where do you want it measured?
- Q. From tip to toe, from the tip of the cow catcher to the rear of the tender?
- A. Sixty seven feet.
- Q. Is that correct?
- A. Yes, sir; within a few inches.
- Q. That engine is 67 feet from the tip of the cow-catcher to the rear end of the tank?
- A. Yes, sir.
- Q. You are not counting anything in there for the coupling apparatus?
- A. No, sir.
- Q. That is approximately correct?
- A. Yes, sir.
- Q. I notice you have got on this map a point marked "X" as indicating where the body of Van Harris was found?
- A. Yes, sir.
- Q. You didn't find him did you?
- A. No, sir.
- Q. The only way you located the place was by finding some blood?
- A. Yes, sir.
- Q. And somebody had covered that up?
- A. Yes, sir; shoved some cinders over it.
- Q. Did you notice anything in the track there where they shoved these cinders over there?
- 167 A. No, sir; as smooth as a board. The only thing was where they covered the blood with some cinders.
- Q. At the time Van was killed the testimony shows his body was back up here under the tender, your cross-mark has put him right between the tender and the front car isn't it?
- A. Yes, sir.
- Q. That is a mistake on here isn't it?
- A. That point on here was the point that was pointed out to me where Van was picked up.
- Q. And you have put your mark over that?
- A. Yes, sir.
- Q. And if his remains were found under the tank you have got your cross-mark a little too far?
- A. If his remains were found under the truck of the tank.
- Q. I don't think there is any dispute about that. Then your cross-mark is not correct if his body was found under the tank?
- A. No, sir; not if that is where it was at the time of the accident.
- Q. How many camp cars were over there at the time of the accident?
- A. Eight.
- Q. Eight for work train purposes?
- A. Yes, sir.
- Q. That track is level there is it?
- A. Yes, sir; perfectly level.
- Q. No grade?
- A. No grade either way, no, sir.

Q. How wide is that engine say from cab to cab outside?

A. I would say about nine feet, the edges or eaves might edge over a little more than that, or arm rest.

Q. You said it was how far from this camp car door to the engine?

168 A. Across here?

Q. Yes, sir?

A. Twenty-seven feet.

Q. Then adding the nine feet on that, you say it is 27 feet?

A. Yes, sir.

Q. That would be about 36 feet, wouldn't it, to the fireman's side of the cab?

A. Yes, sir.

Q. This diagram was made the day after Van is said to have been killed?

A. 9:55 next morning; the notes were taken next morning and information gotten up.

By Mr. Bozeman: Who pointed you out that blood as the place where Harris was killed?

A. I think it was Gerau and that boy standing in the door there, or standing at the door.

Q. Gus Nelson?

A. Yes, sir.

Q. Mr. Guerin, car inspector?

A. Yes, sir; Guerin, car inspector and several other men in the yard.

Mr. Fewell: We object to what some other witness told him.

The Court: I think you ought to show by one of the witnesses that they pointed it out to him.

Mr. Bozeman: I will do it.

Q. You put that mark exactly where Guerin showed you?

A. I don't know exactly it is Mr. Guerin told me. One of the witnesses that was out there showed me where these cinders were thrown and I found the place and I marked it.

Q. Mr. Fewell said something to you about the man's body being under the tank. If the tank wheel, the back wheel on the tank on the right-hand side had rolled up, between his legs and just

169 caught him here on the lower part of his body and he was lying out stretched out on the rail would his head come about opposite the tank or where would that be?

A. Probably come about where that "X" is and of course that distance would depend on the size of the man.

Q. How far is it from the back end of the tank to the wheel of the trucks next to it?

A. They are not all the same.

Q. What is the distance on this engine?

A. I don't know; I never measured it.

Q. Can't give us any idea about it?

A. I would say three feet.

Q. Three feet?

A. Yes, sir.

Q. Your idea is that if the wheel on this tank had rolled up the man's leg and was across his hand about in that position across his hand that his head would be where that "X" is?

A. No, sir.

Q. Where would his head be if that was the situation?

A. His head would be about under the edge of the tank.

Q. You mean if the wheel stopped about his groin his head would be just about the outer edge of that tank there?

A. Yes, sir.

Q. And if it came up here to about his navel, then his head would be under the tank there wouldn't it?

A. Yes, sir.

(Witness excused.)

WILL CROWELL, (Colored) being first duly sworn, was produced and testified as follows, to-wit:

Direct examination by Mr. Bozeman:

Q. You are a fireman, ain't you Will?

A. Yes, sir.

Q. Locomotive fireman?

170 A. Yes, sir.

Q. How long have you been a locomotive Fireman?

A. About eight years.

Q. Talk a little louder.

A. Eight years.

Q. Now Will, were you the fireman on this engine here in New Orleans, La., when Van Harris was hurt?

A. Yes, sir.

Q. Who was your engineer?

A. Mr. Fred Strobel.

Q. What was Van doing at the time? That is, what his business was at the time he got hurt? What were you all doing with the engine and what was Van doing?

A. What I speak of seeing him doing?

Q. No, what were you doing with the engine?

A. Went up to the engine and coupled up to the train.

Q. Who was running the engine?

A. Mr. Strobel.

Q. Mr. Fred Strobel?

A. Yes, sir.

Q. Were you in the engine?

A. Yes, sir.

Q. While you were backing the engine down to couple on to the train where were you riding?

A. Fireman's seat box.

A. What were you doing?

A. Ringing the bell.

Q. Where was the engineer, Mr. Strobel?

A. On the engineer's side.

Q. Where was Van Harris? Could you see Van?

A. No, sir.

Q. Why couldn't you see him?

A. He was on the engineer's side.

Q. He was on the engineer's side?

171 A. Yes, sir.

Q. Just go ahead now Will and tell what was the first thing you knew of Van being hurt?

A. I didn't know anything till after we made the coupling and got down—Mr. Strobel got down and didn't see anything of Van and he asked me did I see Van. I told him no sir. He says, Look out on that side. I was looking out on the side. He kept shoving his brake valve around. He says, I wonder what he is doing. I told him I didn't see him around there. He got down on the ground and walked around under there and he says, We have done killed Van.

Q. Never mind about any conversation. Is that the first you knew about it?

A. Yes, sir.

Q. When the coupling was made there the engine stopped?

A. Yes, sir.

Q. After the engine stopped did it move again?

A. No, sir.

Q. Who was giving the signals to the engineer about making that coupling when to back up and when to stop?

A. I couldn't see on that side.

Q. And you didn't know who was doing that?

A. No, sir.

Q. Whose business was it to do that?

A. The brakeman's.

Q. Who was the brakeman there with the engine?

A. Van Harris.

Q. He was not on your side?

A. No, sir.

Q. And you couldn't see him?

A. Couldn't see him.

Q. Did you see any man riding down on the engine from about Press Street out there in the yard, any colored man?

A. No, sir.

172 Q. When Mr. Strobel got off the engine, when he didn't see anything of Van and he asked you if you saw him, you say he kept moving his lever, what was he doing that for?

A. To see whether the air was cut in, shoving his brake around.

Q. Did the train move at all when he was moving his lever around?

A. No, sir.

Q. Did you get out of the engine at all?

A. Afterwards.

Q. After the accident?

A. Yes, sir.

Q. Did you get out of the engine before Mr. Strobel got off?

A. No, sir.

Q. When the engine made the coupling were you standing out on the engineer's side with an oil can in your hand?

A. No, sir.

Q. Were you standing out there at all?

A. No, sir.

Q. Where were you when the engine made the coupling?

A. Sitting on the seat box.

Q. Sitting on the seat box?

A. Yes, sir.

Q. In the cab of the engine?

A. Yes, sir.

Q. Did you look out at all on the fireman's side?

A. Yes, sir.

Q. Did you look back there to see if you could see Van?

A. Yes, sir.

Q. Did you see him anywhere?

A. No, sir.

Q. Did you know he was hurt?

A. No, sir.

Q. Did you see or know he was between the car?

A. No, sir.

Q. Did you see anybody out there opposite the end of the engine?

173 Q. Did you see anybody out there with blue overalls on?

A. No, sir.

Q. Do you know Dennis Thomas?

A. I don't know him.

Q. Did you see any colored man out there at all standing opposite the track where this occurred?

A. No, sir.

Q. And where is the tool box carried in the engine?

A. On the corner of the tank.

Q. Corner of the tank?

A. Yes, sir.

Q. State whether or not Van Harris had any clothes in that tool box that day on the engine?

A. No, sir; he didn't have any clothes on there.

Q. Did this man Dennis Thomas or anybody else ask you about any clothes of Van Harris in that tool box?

A. No, sir.

Examination by Mr. Fewell:

Q. How far was it from the round house down to where you coupled on the train?

A. About half a mile.

Q. About half a mile?

A. Yes, sir.

Q. Did you have to cross Claiborne avenue?

A. Yes, sir.

Q. What was it blocked you up down Claiborne Avenue?

A. Switch engine.

Q. So you did get in a block up there at Claiborne Avenue?

A. Yes, sir.

Q. You had to wait till the switch engine cleared the track didn't you?

A. Yes, sir.

Q. Did you see Van there?

A. Seen him when we threw the switch.

174 Q. Didn't the engineer send Van down there to see what was the matter down there?

A. Yes, sir.

Q. And Van went on down to the switch engine and got them to clear your track?

A. Yes, sir.

Q. And he then begun to line the switches up or throw them or whatever you call them down there to your train?

A. Yes, sir.

Q. Did you see anything of a tin bucket down there?

A. Van had a tin bucket.

Q. When did you first see the tin bucket?

A. He had it in his hand.

Q. At the round house?

A. No, sir; at the switch.

Q. What did he do with the bucket?

A. He had the bucket to put water in it.

Q. Carried the bucket along with him?

A. Yes, sir.

Q. How long were you delayed up there at Claiborne Avenue?

A. About 15 or 20 minutes.

Q. 15 or 20 minutes?

A. Yes, sir.

Q. Then you cleared and went on down and started into the track that your train was on?

A. Yes, sir.

Q. Who threw the switch to let you into the track the train was on?

A. Van Harris.

Q. Then Van had gotten off of the front of the engine?

A. Yes, sir.

Q. And gone around to the rear of the engine?

A. Yes, sir.

175 Q. Up to the time you had gotten to that switch he had been riding on the front of the engine hadn't he Will?

A. Yes, sir.

Q. Which side did he come around on, on your side or engineer's side?

A. Engineer's side.

Q. The engineer's side is the proper side for the brakeman to work on isn't it?

A. Yes, sir.

Q. It is heap easier for him to work on the engineer's side and the engineer gets his signals quicker?

A. Yes, sir.

Q. If he was on your side you would have to repeat the signal to the engineer?

A. Yes, sir.

Q. You say you backed down there?

A. Yes, sir.

Q. Did you feel the coupling meet?

A. Yes, sir.

Q. How was the coupling made? Was it easy?

A. Yes, sir.

Q. Was the coupling moved after the coupling was made?

A. No, sir.

Q. Van Harris was found under the wheel of the tank wasn't he?

A. Yes, sir.

Q. So that part of the tank had passed over him hadn't it?

A. One wheel.

Q. Yet, you tell the jury the train stopped when the coupling was being made?

A. Yes, sir.

Q. Can you account for how he got under that engine?

A. No, sir.

Q. You didn't see him get under there?

A. No, sir.

176 Q. The engineer didn't see him get under there?

A. No, sir; I don't—

Q. What was it you said the engineer asked you?

A. Asked me did I see anything of him over there.

Q. Did you see—you see anything of Van over there?

A. Yes, sir.

Q. You say he was still fooling with his brake lever?

A. Yes, sir.

Q. That was his air?

A. Yes, sir.

Q. What was he doing with that?

A. He was shoving it around to see if he had his air cut in.

Q. That was what he went in there for, wasn't it? That was his business?

A. Yes, sir.

Q. The engineer kept shoving this lever?

A. Yes, sir.

Q. Could he tell whether it had been cut in or not?

A. He shoved his brake around to find out.

Q. He shoved his brake around and found out the air didn't take to the balance of the train?

A. Yes, sir.

Q. Was it before he shoved his brake around and fooled with the brake lever before he turned to you or after?

A. Afterwards.

Q. Then he says, "Do you see Van over there anywhere?"

A. Yes, sir.

Q. What else did he say?

A. That is all.

Q. You told him no?

A. Yes, sir.

Q. You say he disappeared from this side and went in between the cars?

177 A. I didn't see him when he went in there.

Q. When the brakeman cut in the air Will, isn't it customary for him to give a signal to the engineer that he has turned it in for him?

A. I didn't see him give a signal.

Q. I didn't ask you that. Here is a man couples on to a train and it is dead, and they couple up the engine, the brakeman's duty is to go in there and couple up to this air hose isn't it?

A. Yes, sir.

Q. And in coupling on there he turns on the angle cock on both sides?

A. Yes, sir.

Q. From the engine into the car?

A. Yes, sir.

Q. Isn't it customary for that brakeman when he cuts on that air to step back and give a signal to the engineer that the air is on?

A. I never seen him do that.

Q. How does the engineer know that he has got them cut in?

A. It shows effect, his gauge.

Q. How does the engineer know he has got his angle cock on? If his brake don't show that *that* air is turned into that train he has got to wait for him to give a signal to you he has got it on?

A. Yes, sir.

Q. Did Van Harris give any signal to this engineer that he had coupled up this air?

A. I don't know.

Q. You weren't on that side?

A. No, sir.

178 Q. Do you know in fact whether there were any air hose cut on?

A. No, sir.

Q. On the back of the train that you all were running that day what is there back there to hang that air hose on if anything?

A. I never noticed for it.

Q. You didn't have anything to do with coupling it up or anything of that kind?

A. No, sir.

Q. Your business kept you on the engine?

A. Yes, sir.

Q. Why didn't you get off the engine there and help them get the engine off that boy?

A. I didn't know it till we were over him.

A. You heard Mr. Strobel say "We have killed Van," didn't you?

A. We stayed up there and pulled it off of him.

Q. Didn't you hear him ask that man to lift up that lever?

A. Yes, sir.

Q. Why didn't you do that?

A. I was up in the engine.

Q. Which side did Mr. Strobel get off on?

A. On the right hand side.

Q. That is his side?

A. Yes, sir.

Q. You know where you sat?

A. Yes, sir.

Q. Where were you when he told you he was killed?

A. I was on my seat box.

Q. Where did the engineer go when he got off the engineer's side?

A. He went back there to the tank.

Q. Where they coupled up to that car?

A. Yes, sir.

Q. Then you say he came back—came around to the front of the engineer where you were?

179 A. Yes, sir.

Q. And told you he had killed Van?

A. Yes, sir.

Q. Then what did he do?

A. Went on around the engine.

A. He didn't go around there but once did he?

A. No, sir.

Q. Well, we have got him around the engine, and he told you he had killed Van. What did he do then?

A. He went on down the train.

Q. How far down the train did he go?

A. I don't know; about ten cars I suppose.

Q. In the meantime while he was gone down the train did you see this man Guerin, the car inspector, come by?

A. I didn't see him.

Q. He passed right by you?

A. I didn't see him.

Q. You knew there was a dead negro under the engine tank and you just set up there and didn't pay any attention to anybody passing at all?

A. No, sir.

Q. You were watching the engineer way back down yonder?

A. Yes, sir.

Q. And then he turned and came back?

A. I didn't see him when he turned and came back.

Q. When did you see him after he turned back?

A. He came up on the engine.

Q. Isn't this what happened, that the engineer turned back and met Mr. Guerin right at the back end of the tank there, and isn't

it a fact that the engineer asked Mr. Guerin to lift up this lever and uncouple the cars and get it off of that man and the engineer came back there and got on the engine and moved it up?

180 A. I didn't hear him.

Q. Your idea is that you didn't see him do that?

A. No, sir.

Q. The engineer came up on your side?

A. Yes, sir.

Q. And went across?

A. Yes, sir.

Q. And threw the engine over?

A. Yes, sir.

Q. Hadn't that engine been thrown over at that time?

A. No, sir.

Q. The engine was still in backward position was it?

A. Yes, sir.

Q. He then threw the engine over didn't he?

A. Yes, sir.

Q. Who uncoupled that engine?

A. The car knockers.

Q. Who was the car knocker?

A. I don't know what his name is.

Q. Wasn't it Mr. Guerin?

A. I don't know.

Q. Haven't you seen him here in the room?

A. Yes, sir; I seen him but I didn't know his name at the time.

Q. Where did he uncouple from? From your side or the engineer's side?

A. He uncoupled from the engineer's side.

Q. He was over there next to the camp cars?

A. Yes, sir.

Q. Ain't you mistaken about that?

A. No, sir.

Q. Isn't it a fact that this man uncoupled from your side of the engine?

A. No, sir.

Q. It is not?

181 A. No, sir.

Q. When this man coupled up to an engine and stopped, you say he left his engine in backward motion?

A. Yes, sir.

Q. He wasn't going any further back than that was he?

A. No, sir.

Q. His idea was to go north wasn't it?

A. He coupled up there.

Q. I say when you coupled up his idea was to come on north as soon as he got his orders wasn't it?

A. Yes, sir.

Q. And notwithstanding that he just left his engine in the back motion position?

A. Yes, sir.

Q. Didn't throw the quadrant over?

A. No, sir.

Q. How long after the engine backed there before the engineer asked you if you saw Van before he got off and looked for him?

A. About three minutes.

Q. You mean to tell the jury that that engineer set on that engine about three minutes after those cars came together before he asked you if you saw Van over there?

A. No, sir.

Q. As a matter of fact you don't know how Van got killed, do you?

A. No, sir.

Q. As a matter of fact nobody else knows do they?

A. No, sir.

Mr. Bozeman: We object.

Question withdrawn.

Q. On which side was he killed?

A. On the right side.

Q. Well, you didn't see him then?

A. I didn't see him till after that.

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Q. After Mr. Strobel got off and went to the back and then came back and went down to your side of the train, what was your position in the cab? How were you facing?

A. I was sitting this way.

Q. Leaning out of the window?

A. Yes, sir.

Q. And leaning back down the track the way you were going?

A. Yes, sir.

Q. Did you stay in that position till Mr. Strobel asked you if "you see Van over there"?

A. Yes, sir.

Q. Did anybody ask you about their uncle down there that day?

A. No, sir.

Q. Didn't anybody call to you and ask you about their uncle?

A. No, sir.

Q. Didn't you know some negroes that were over there in the camp cars?

A. No, sir.

Q. You didn't know them at all?

A. No, sir.

Q. Don't you know Gus Nelson?

A. Do I know him?

Q. Yes, don't you know Gus Nelson?

A. Yes, sir.

Q. What does he do?

A. He cooks on the camp car or "flunks."

Q. You say you knew Gus Nelson?

A. Yes, sir.

Q. What does he do?

A. He works on the camp cars.

Q. Isn't it a fact that Gus Nelson and you had a conversation while you were standing there on that engine and he asked you about his uncle?

A. No, sir.

183 Q. It is not?

A. No, sir.

Q. Didn't he holler across there and have some conversation with you before you all hunted for this man?

A. No, sir.

Q. Did you see Gus there that day?

A. No, sir.

Q. You were the only fireman on the engine weren't you Will?

A. Yes, sir.

Q. Your name is Will Crowell?

A. Yes, sir.

Q. You didn't see Gus there that day?

A. No, sir.

Q. You say you don't know Dennis Thomas?

A. No, sir.

Q. Did you see who took Van Harris' remains off?

A. No, sir.

Q. Where were you during that time?

A. In the engine.

Q. You were still on the engine?

A. Yes, sir.

Q. Never did get out there to help at all?

A. I got off but I never helped them.

Q. Did you see them put his remains on?

A. No, sir.

Q. Didn't you see them put a ladder out there and put his body on the ladder?

A. No, sir.

Q. What were you doing during that time?

A. I got back in the engine.

Q. Didn't they take this man's remains off on the fireman's side?

A. I don't know what side they took them off on.

184 Q. You didn't see them take them off at all?

A. No, sir.

Q. Did you see the switch engine and a box car both doing down there and take his body off?

A. I don't know why they put him in. I just saw the switch engine.

Q. Saw the switch engine have a car attached to it?

A. Yes, sir.

Q. Did you see Mr. Charlie Strobel come up there?

A. No, sir; I didn't see him when he come up.

Q. He was the conductor wasn't he?

A. Yes, sir.

Q. Did you see him at all till you got ready to leave there and the thing was all over?

A. Never seen him till we got ready to leave.

Q. How long have you known Van?

A. I have known him about seven years or more.

Q. Been railroading practically all his life hasn't he Will?

A. Yes, sir; since I have been knowing him.

Q. Ever since you have been knowing him?

A. Yes, sir.

Q. Been braking on this particular road hasn't he?

A. Yes, sir.

Q. Been braking pretty regular?

A. Well, no sir; not to say regular, working extra.

Q. Working extra?

A. Yes, sir.

Q. He made some time every month didn't he?

A. Yes, sir.

Q. Had he ever broke on a train you were on before that?

A. Yes, sir.

185 Q. Did you go down on the train the day before that he broke on?

A. The day before?

Q. Yes?

A. No, sir.

Q. Didn't you get off right behind Mr. Fred Strobel and go around there to look at that man under the engine?

A. After he come back and told me?

Q. What?

A. I never went around till he come back and told me.

Q. He went down on the other side of the train then, didn't he?

A. Yes, sir.

Q. When was it he come around and told you?

A. After he was passing by the engine.

Q. You got down then of yourself?

A. Yes, sir.

Q. You didn't go down then and follow Mr. Fred Strobel around?

A. No, sir.

Q. He was under the engine at that time wasn't he?

A. Yes, sir.

Q. You have been firing the seven years you worked for the railroad?

A. Eight.

Q. Do you know anything about oiling around an engine?

A. Yes, sir.

Q. What is the best position to put that engine in to oil around?

A. What is the best position?

Q. Yes?

A. It is according to how she is standing.

Q. Suppose you want to oil the oil boxes on the driver, what would be the most convenient position to put that engine in to oil?

A. That is kinder impossible. It is the way he wants to oil it.

186 Q. I am talking about oil the oil caps on the drier boxes. Is there such a thing as putting an engine on the center?

A. Yes, sir.

Q. What does that mena?

A. According to whether she is broke down or not.

Q. You can put her on the center without being broke down can't you?

A. Yes, sir.

Q. Does that put the oil cups more get-at-able?

A. Yes, sir.

Q. That makes your oil cup more convenient to oil the engine that way?

A. Yes, sir.

Q. Ain't it a fact your engine was on the center that day right after it stopped?

A. I don't know sir.

Q. When did you oil around?

A. I didn't oil. Mr. Strobel oiled.

Q. Ain't it the fireman's duty to oil around?

A. No, sir.

Q. He just sets up on the box and rings the bell and chunks the fire when you want it?

A. Yes, sir.

Q. That is all he does?

A. Yes, sir.

Q. The engineer oils around?

A. Yes, sir.

Q. Why is it more convenient to oil around when the engine is on the center than it is when it is not on the center on your side?

A. That is kinder most impossible.

A. Most impossible?

A. Yes, sir.

187 Q. Why impossible?

A. He might not want to oil on the center of it.

Q. Suppose he wants to oil on the center, by putting the engine on the center on one side does that make the cups more convenient to get at?

A. I don't know sir, how he wants to oil. He might not want to oil on the center.

Q. Suppose he wants to oil on the center, putting the engine on the center will put all these oil boxes right on line won't it?

A. Yes, sir.

Q. He then won't have to lean over and down as he goes along, they are all right along in line aren't they?

A. Yes, sir.

Mr. Bozeman: You don't have anything to do with handling the lever in that engine do you?

A. No sir.

Q. You have nothing to do with throwing it in back motion or forward motion?

A. No, sir.

Q. Nor with handling the throttle?

A. No, sir.

Q. Nor with handling the brake?

A. No, sir.

Q. Nor with putting it on the center?

A. No, sir.

Q. That is not your business?

A. No, sir.

Q. You didn't have anything to do with oiling it that day?

A. No, sir.

Q. If this man Gus Nelson was standing over there in the camp car door and hollered at you, you didn't hear him?

A. No, sir.

188 Q. Did you see the camp cars out there?

A. Yes, sir; I seen the camp cars.

Q. Which side were they on from you?

A. From me?

Q. Yes?

A. They were standing on the right-hand side.

Q. Was that on your side or the engineer's side?

A. I didn't see that that day, because I didn't look that day.

Q. If this negro Gus Nelson hollered at you while the engine was moving there, you didn't hear it?

A. No, sir.

Q. You don't say he didn't holler at you?

A. No, sir.

Mr. Fewell: We object to that mode of examination.

The Court: He said he didn't hear him.

Q. Do you know his uncle?

A. No, sir.

Q. You know Gus?

A. Yes, sir.

Mr. Fewell: Don't you sometimes operate the engine?

A. No, sir.

Q. Ain't it a fact that every fireman on the road sometimes operates the engine?

Mr. Bozeman: We object to that, the question is whether he operated it.

The Court: The question is whether he operated it.

Q. You tell that jury you never have operated an engine since you have been firing?

Mr. Bozeman: Objected to.

Overruled. Defendant excepted.

The stenographer read the question.

A. No, sir.

Q. What do you mean by that?

A. No, sir; I haven't operated one.

189 Q. You never have operated one?

A. No, sir.

Q. And you have been firing eight years?

A. Yes, sir.

(Witness excused.)

Mr. FRED STROBEL, being first duly sworn, was produced and testified as follows, to-wit:

Direct examination by Mr. Bozeman:

Q. Your name is Mr. Fred Strobel?

A. Yes, sir.

Q. Where do you live Mr. Strobel?

A. Meridian.

Q. How long have you lived here?

A. 20 years.

Q. What is your business?

A. Engineer on the Northeastern.

Q. Locomotive engineer?

A. Yes, sir.

Q. Talk a little louder. How long have you been a locomotive engineer on the New Orleans and Northeastern Railroad?

A. 15 years.

Q. Right straight along?

A. Yes, sir.

Q. You have been running a locomotive on the Northeastern road that length of time?

A. Yes, sir.

Q. Mr. Strobel, were you the engineer on the engine 265 in New Orleans, La., on the day that Van Harris was injured down there?

A. Yes, sir.

Q. Just explain to the Court and the jury what you were doing at the time Harris was hurt? What were you doing with your engine?

190 A. Backing up to couple into the train.

Q. Who was operating your engine?

A. I was.

Q. What engine was that Mr. Strobel?

A. 265.

Q. Was that a passenger or freight engine?

A. She was bought for a freight engine to use in either service, passenger or freight.

Q. Use in either service?

A. Yes, sir.

Q. In order to make it so that it could be used either as a passenger or freight engine how was it constructed with reference to a vestibule train?

A. It had the vestibule on the back of the tank, a spring bumper.

Q. Did that interfere in any way with its operation as a freight engine?

A. No, sir; none whatever.

Q. This vestibule frame on there, how was it fastened to the tank of the engine?

A. It is riveted on there.

Q. Riveted on?

A. Yes, sir.

Q. What that built on as a permanent part of the engine or could you take it off when you want to use the engine for freight, or was it on there permanently?

A. *a* On there permanently.

Q. Was it big enough for anybody who was about the engine, who was working about the engine, to see it?

A. Yes, sir.

Q. Plain for a man to see?

A. Yes, sir.

Q. About how wide was that frame?

A. I suppose three feet and a half.

191 Q. About how high?

A. It projects over the top of the tank about two foot, or two foot and a half from the top of the tank.

Q. That would make it in all about how high from the bottom?

A. About seven' foot I suppose.

Q. It is constructed like an ordinary door frame?

A. Yes, sir; it projects outside of the top of the engine tank about 6½ feet.

Q. Like this is the engine tank?

A. Yes, sir.

Q. This is this vestibule frame you call it?

A. Yes, sir.

Q. It sets out that way?

A. Yes, sir, but that is not solid, it is hollow.

Q. Where does the frame set with reference to the coupling?

A. It is 12 or 15 inches higher than the coupling.

Q. Like this book was the coupling, the frame set above that did it?

A. Yes, sir.

Q. How long has that engine been in use on the Northeastern?

A. Ever since it has been bought.

Q. How long has it been here?

A. About four or five years.

Q. Is there any advantage in having an engine equipped so you can use it in freight or passenger service?

A. They all have to be so you can use them in either service, steam head, air and whistle.

Q. Was this engine equipped so you could use it in either service?

A. Yes, sir.

Q. I will ask you whether or not this engine that you were using there with this vestibule frame on it on the rear of the tank, assuming it was coupled to a car and that the car and the engine were standing still, coupling had been made, and everything was still and a brakeman would go in there to couple the air

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hose, would there be any danger of him getting hurt by that vestibule fram- there with the train and engine standing?

A. No, sir.

Q. You say there would not?

A. No, sir.

Q. Now Mr. Strobel, when did you go to New Orleans? On what trip before this day that Van was killed?

A. On 39, that morning it happened, at 12.25 the morning the accident happened. We stayed in New Orleans 17 hours before we were called out again.

Q. 12.25 would be about midnight would it before he was killed?

A. Yes, sir.

Q. Was Van Harris brakeman on that train?

A. Yes, sir.

Q. No. 39?

A. Yes, sir.

Q. Come down with that engine?

A. Yes, sir.

Q. Now Mr. Strobel, going back to the accident and injury to Van Harris on that occasion, just state to the jury now what you were doing in the way of handling your engine in coupling it up to the cars or train? Where had your engine come from?

A. The round house.

Q. In going to make this coupling were you backing or heading up?

A. Backing up?

Q. The head of your engine was what direction?

A. North.

Q. You were backing up.

A. Yes, sir.

193 Q. Where were you riding?

A. On my seat box, it is a trap seat. You trap it out of the way and set on the arm rest.

Q. That is on the engineer's side of the engine?

A. Yes, sir.

Q. Was the fireman there?

A. Yes, sir; he was sitting on the left hand side of the engine on the fireman's seat box.

Q. What was he doing?

A. Ringing the bell.

Q. Where was Van Harris?

A. On the right hand corner of the tank.

Q. Had Van thrown any switches before you got to this coupling?

A. Yes, sir.

Q. How far was the last switch he had thrown before this car he was going to couple?

A. About 100 feet I suppose.

Q. Did he throw that switch before you got coupled or after?

A. He jumped off that engine and run and throwed that switch before I got to it and that signalled me to back down.

Q. Which corner was it he was on?

A. On the right hand corner.

Q. The back corner?

A. Yes, sir.

Q. After he threw this switch and caught the car, how far did he have to go?

A. About 100 feet from the tank to the car.

Q. How high was he? How was he holding on?

A. Standing on the step and holding on.

Q. Was there anybody giving you signals on that occasion showing you when to stop and how to make the coupling to the engine?

A. Van Harris.

194 —. Was it his business to give you those signals?

A. Yes, sir.

Q. Was he giving you signals on that occasion?

A. Yes, sir.

Q. When sitting on the seat what were you doing?

A. I was looking at him, handling my brake slowing the engine up to strike the train.

Q. When Van was riding on that corner was he giving you any signal?

A. Yes, sir.

Q. Was he riding on the tank when you were backing up?

A. Yes, sir.

Q. What signal did he give you?

A. To back up.

Q. Did he continue to ride on the tank corner till you coupled up?

A. No, sir; he jumped off about 15 or 25 feet from the car, and gave me a signal to back up.

Q. You were then how far from the car?

A. 15 or 20 feet.

Q. Then what became of him?

A. We got about five or ten feet from the train he ran in between the engine and the car, and that is the last I saw of him.

Q. After he gave you the signal he ran in between the engine and car?

A. Yes, sir.

Q. Did you know whether he had crossed over on the fireman's side or what had become of him?

A. No, sir; after we set there possibly 15 or 20 seconds, I didn't see him, I asked the fireman did he come out on his side. He said he didn't see him.

Q. You had made your coupling?

A. Yes, sir.

195 Q. Did you make the coupling by the impact striking the engine and cars?

A. Yes, sir.

Q. After you made the coupling what did you do with your engine, did you move it anywhere?

A. No, sir; I never moved it at all.

Q. What were you waiting for?

A. Waiting for him to cut the air in on the train.

Q. Were you expecting any signal or was it his duty to give you any signal before you moved the engine any further?

A. After he coupled the engine up to the train he didn't have any business giving me any more signal till the conductor come.

Q. How did you know when he had cut the air in?

A. By the drop of the gauge on my engine.

Q. Did you notice the gauge on your engine?

A. Yes, sir.

Q. Did you see any drop in it?

A. No, sir; none at all.

Q. Did you see any indication the air had been cut in?

A. No, sir.

Q. What were you waiting for?

A. I waited three, four or five seconds to see why he didn't cut the air on, and I jumped down on the ground and went back to the end of the tender.

Q. Did anybody call your attention?

A. And about time I got down this boy Gus Nelson hollered to me that the brakeman was under the train.

Q. Did you walk there to him?

A. I went back there to him.

Q. How did you find him?

A. I found him with the wheel, with his leg straddle of the rail, with his head laying south, and the back part of the wheel run up to about his groin here.

196 Q. How were his legs?

A. Straddle the rail.

Q. Was he conscious or unconscious?

A. Unconscious.

Q. Did he ever regain consciousness?

A. No, sir.

Q. What did you do when you found him in that position?

A. I run around the engine looking for somebody to cut the car off and I possibly went three or four cars beyond the engine and I didn't see anybody at all, and I run possibly three or four car lengths and I saw George Guerin coming.

Q. Which way was he coming?

A. From the north. And I told him to go and cut it loose.

A. You first got off on your side?

A. Yes, sir.

Q. Your purpose was to go back and see where the man was?

A. Yes, sir.

Q. Did you know at that time he had been hurt?

A. No, sir.

Q. Did you know he was between the car?

A. No, sir.

Q. Did you know where he was?

A. No, sir.

Q. As you got off this negro Gus Nelson hollered at you?

A. Yes, sir.

Q. Did you go around on the fireman's side?

A. Yes, sir.

Q. Did you go around on the fireman's side?

A. Yes, sir.

Q. Did you go back through the engine?

A. All the way around the engine.

Q. What were you looking for?

A. Somebody to cut the engine off.

Q. When you went around on the fireman's side did you see a negro in blue overalls or blue jumper standing out there on the fireman's side opposite where this accident happened?

197

A. No, sir.

Q. Did you see a man of that description there at all?

A. After the accident happened and we got the engine loose, there was a man like that around there.

Q. Did you see him before you cut it off and when you were looking for somebody to cut off?

A. No, sir.

Q. Did you see anybody around there at that time looking like that?

A. No, sir.

Q. After you got somebody to cut the cars off, what did you do?

A. I moved it ahead.

Q. How far?

A. I suppose twelve or fifteen feet.

Q. After you moved it off, what did you do?

A. I went back there and told my conductor I had killed my brakeman.

Q. That Mr. Charlie Strobel?

A. Yes, sir.

Q. Did he go back there and see how it occurred?

A. Yes, sir; we went back there and examined the lift lever and drawhead and they were all in perfect condition.

Q. Did you find any defective condition at all about any of the couplers or the air hose or drawhead.

A. No sir.

Q. Or lift lever?

A. No, sir; all in good shape.

Q. Was the air hose coupled to that train?

A. They were coupled.

Q. Had the angle cock been turned so as to let the air on the train line?

198

A. No, sir.

Q. Did you examine Van Harris to see how he was hurt, what bruises were on him?

A. I didn't do that.

Q. Did you help put him in the box car?

A. No, sir.

Q. After your engine made this coupling to the train and came to a stop tell the Court and jury whether or not you moved it back a second time?

A. I did not.

Q. State whether it moved back itself, whether that engine moved at all after it made the coupling?

A. I suppose when it struck the car it possibly moved a foot or fifteen inches before it stopped.

Q. That after it struck?

A. No, at the time it struck the car. We only made one stop and the rebound and pulled it back something like that, not over eighteen inches.

Q. Is that the usual and natural effect of making a coupling of that kind?

A. Yes, sir.

Q. State to the Court and jury at what rate of speed you were going in making that coupling there?

A. About two miles an hour.

Q. State whether or not you struck that string of cars hard or how you struck it?

A. About the average coupling, about two miles an hour.

Q. Would that coupling going at that speed, would that cause that little rebound in the engine?

A. Yes, sir; possibly three or four cars back from the engine it will cause that many cars to move.

Q. When that little rebound was over and the engine stopped was it moved again?

A. Never was till we cut it loose from the train.

199 Q. Did that rebound you are speaking of there follow immediately on striking the coupler?

A. Yes, sir.

Q. Followed immediately on striking the coupler?

A. Yes, sir.

Q. Do you remember what position you had your lever in in that train when she stopped?

A. Back motion.

Q. Did the lever being in back motion make the engine move back?

A. Not till I pulled the throttle open and gave it steam. It couldn't move till I pulled the throttle open.

Q. Did you move the throttle?

A. No, sir; I put the engine brake on.

Q. Was that sufficient to hold it?

A. Yes, sir.

Q. Now, Mr. Strobel, did you examine along the track there after Van's body was moved to see whether or not there was any sign on the track there?

A. There was no sign there at all. It was perfectly level.

Q. Did you see any sign on the track there where he had been dragged?

A. No, sir; none whatever.

Q. Did you see any blood there on the ground?

A. There was some blood there.

Q. Was that scattered along?

A. No, sir; just in one place.

Q. Mr. Strobel, when you were moving this engine back there to make that coupling, I forgot whether you stated or not was your engine bell ringing or not?

A. Yes, sir.

Q. Did you move your engine there or about there at all without ringing the bell?

A. No, sir.

Q. How was your engine equipped with reference to having—

A. Equipped with what we call the E. T. equipment, independent and automatic air brakes. You can handle the engine either with the independent or automatic air brake. It is more or less custom to handle the air independent from the tank, you get more pressure coming direct from the tank.

Q. State whether or not that is an improved and standard air brake?

A. It is improved.

Q. State whether or not it is efficient?

A. Fine.

Q. State whether or not your engine was in good working condition?

A. Fine.

Q. Was there any defect or trouble about it?

A. None at all.

Q. How were you handling that engine Mr. Strobel with reference to Van Harris there, that is to say, whether you were handling it carelessly or carefully with reference to Van Harris, who was making that coupling?

Mr. Fewell: We object to that.

Sustained.

Q. What kind of care were you using there Mr. Strobel in handling your engine and making that coupling?

Mr. Fewell: We object to that.

Sustained. Defendant excepted.

Q. Mr. Strobel, do you know this negro Dennis Thomas?

A. No, sir.

Q. Witness for the plaintiff here?

A. No, sir; I do not.

Q. Do you know anything about him riding on your engine from Press Street out to this north yard?

A. I did not see him.

Q. Didn't see him?

201 A. No, sir; I didn't see him on the engine at all.

Q. Did you see him at all till after the accident or after you got Van out?

A. I saw a negro around there after we got the engine off and got him out. I saw a negro around there then, but I never saw him before. He was dressed in blue overalls with a big black, slouch hat on.

Q. Did you see anybody there at all when you went to uncouple that train?

A. No, sir.

Q. Who was controlling the movement of your engine in reference to making that coupling?

A. Who was handling the engine?

Q. No, by whose signals were you handling that engine?

A. Van Harris'.

Q. Anybody else?

A. No, sir.

Examination by Mr. Fewell:

Q. Was Van with your engine when you left the round house?

A. I couldn't say whether he was there when she left the round house; sometimes they stand at the yard office and wait there at the first switch we have to go through.

Q. Do you remember anything happening at Claiborne avenue on that occasion?

A. Yes, sir.

Q. What happened there?

A. I stopped there for a switch engine weighing cars on the scale track.

Q. Did you send Van down there to see what was the matter?

A. No, sir; Van helped me cut a piece of wire in two, held it while I cut it with a cold-chisel.

Q. You just held your engine there till the switch engine cleared the track?

A. Cleared the track and I pulled out of there.

202 Q. You just waited there at the crossing?

A. Yes, sir.

Q. Did you notice anything Van had in his hand?

A. Yes, sir; he had my water bucket in his hand.

Q. Tin water bucket?

A. Tin water bucket, yes sir.

Q. How long had Van been running with you?

A. He had been on my run the trip before this, but not our regular brakeman.

Q. Was that your regular engine?

A. It was a regular manifest engine.

Q. Was that your regular engine?

A. I don't have no regular engine; the same engine crew goes together all the time.

Q. You say Van was an extra man with you?

A. Yes, sir.

Q. How long have you been running that engine?

A. We have three now of the same type, ever since they have been on that run.

Q. How long have you been using this particular engine?

A. I don't know sir; three or four months. She had been off and on the run. We don't have no regular engine on that run.

Q. But you had been using this engine three or four months on that regular run?

A. Yes, sir.

Q. Who was your regular brakeman?

A. At that time?

Q. Yes?

A. I don't know whether it was Will Davis or Jesse Price. I don't know which one of them was our regular brakeman at that time.

Q. Van was an extra man?

A. Yes, sir.

203 Q. The majority of the engines operated in the freight service for the New Orleans & Northeastern Railroad haven't those vestibules have they?

A. No, sir; they haven't the vestibules. We have five or six engines in the freight service that haven't the vestibules.

Q. How many engines in the freight service that haven't the vestibules?

A. I couldn't tell you.

Q. Can you approximate it?

A. I suppose we have fifteen or twenty of them in the freight service altogether, and six or seven with it.

Q. The rest of them haven't got those vestibules?

A. No, sir.

Q. That is a frame that extends out how far from the back of the tank?

A. I suppose five or six inches.

Q. That is not on all of them?

A. Not on all of them, no sir.

Q. Not on all the engines that the vestibules are not on?

A. No sir.

Q. Is there such a thing as a draft bolt that runs from one end of the tank to the other?

A. Yes, sir. But that is strapped around the draft rigging.

Q. Strapped how?

A. Like you put something in here to hold it and a nut at the other end to hold it.

Q. This particular engine that killed Van, was that strapped you say?

A. Yes, sir.

Q. How was that strapped?

A. It was strapped to the draft timber. The timber is down on the engine that holds that drawhead. When it gets to about within a foot of the end of that tank, it is welded on to the draft timber.

204 Q. No bolt at all on that engine?

A. No, sir.

Q. The draft timber is perfectly smooth along there?

A. The end sill is.

Q. Did you see any blood on the vestibule of this engine?

A. I did not on the vestibule. I did on the bumper below the vestibule.

Q. Well, isn't that a part of the vestibule?

A. No, sir; it is below the vestibule. It has two springs on it.

Q. Was that below or above the draw head.

A. Above the drawhead.

Q. Did you notice one of those bumpers bloody?

A. I noticed blood on one of the bumpers.

Q. Those round bumpers, they extend how far out from the end of the tank?

A. There is not but one there.

Q. There is not but one there?

A. That is all.

Q. Just one, big round piece?

A. It ain't round at all. It is made into that shape (showing).

Q. There is just one iron piece that goes across there?

A. Iron plate.

Q. Which side of the plate did you find this sign on?

A. On the right hand side.

Q. That was on the engineer's side?

A. Yes, sir.

Q. That is above the couplers isn't it?

A. Yes, sir.

Q. And how far above Mr. Strobel, approximately?

A. Three or four inches possibly.

Q. You say that as you got how close to this car, or how close had you gotten to this car when Van got off the engine?

A. About 15 feet I suppose.

205 Q. About 15 feet.

A. Something like that, yes sir.

Q. He had been riding on an iron step that is on the end of the tank, hadn't he, and hanging on an iron handhold?

A. Yes, sir.

Q. And he got down off the engine?

A. Yes, sir.

Q. And begun to slack you back as they call it?

A. Yes, sir.

Q. And how close had you gotten to the car before Van disappeared?

A. I suppose about five or six feet, something like that.

Q. He had been riding on an iron step that is on the end of the tank and the end of the car coupled up?

A. I suppose about 26 or '8 inches.

Q. That would be a little over two feet?

A. Yes, sir.

Q. He disappeared from your sight?

A. Yes, sir.

Q. You don't know how he got killed then?

A. No, sir.

Q. Do you know how whether he got under the engine there, as a matter of fact?

A. No, sir.

Q. Do you know what knocked him down if anything knocked him down?

A. I do not, unless he attempted to couple to the air hose.

Q. That is just your judgment about it, you didn't see him when he was knocked down there?

A. No, sir.

Q. You don't know as a matter of fact how he was knocked down underneath there.

A. No, sir.

206 Q. You just know by drawing your judgment and conclusion about it?

A. Yes, sir.

Q. You don't know anything about how he got knocked down there and run over?

A. No, sir.

Q. How far is the rear wheel of that tank from the rear of the tank?

A. I suppose it is between 25 and 30 inches.

Q. And then on the outside of the tank it is a piece of wood, isn't it? What do you call that, an end sill?

A. The end sill on the back.

Q. There is an end sill that is on the back, isn't there?

A. Yes, sir.

Q. How far does that extend beyond the tank?

A. Don't extend at all beyond the tank. What you mean? On the side or behind?

A. On the back end of the tank?

A. I suppose three or four inches.

Q. That would make it in all from the outside of this end sill say some thirty inches to the wheel. Now, you tell the jury that you found these air hose coupled up?

A. Yes, sir.

Q. They weren't coupled up till after you coupled your engine and cars were they?

A. I couldn't say that. I wasn't back there. They wouldn't have been coupled till the engine went together with the coupling.

Q. Sir?

A. They couldn't have been coupled unless somebody had coupled them as the engine went together with the coupling.

Q. These rubber hose don't reach sufficiently far for any one to couple them till they couple together?

207 A. I suppose when the drawhead was about eight inches apart you could couple them.

Q. These air hose were coupled?

A. Yes, sir.

Q. And there was a blood mark above the drawhead?

A. Yes, sir.

Q. Which angle cock was closed?

A. Both of them.

Q. Both of them were closed?

A. The one on the engine was closed. I never looked at the other one because there was no use in looking at it, if the one on the engine wasn't open.

Q. Where was that angle cock?

A. On the right-hand side of the tank.

Q. On the same side that Van went in on?

A. Yes, sir.

Q. How is that angle cock constructed?

A. It is just a cock opens and closes to cut out the air.

Q. It has a lever on it hasn't it?

A. Yes, sir.

Q. A good, big lever that is sorter crooked and bends down the cock doesn't it?

A. Yes, sir.

Q. You say that was cut out?

A. Cut out.

Q. You say taking 47 cars and an engine and caboose, Mr. Strobel, with the cars as situated then, on a level, and cars under hand brake and you couple up to 47 of those cars under those conditions, moving at the rate of two miles an hour, which way do you say the slack will go?

A. It will go both ways for a second, but finally the back of the train.

Q. At two miles an hour?

A. Yes, sir.

208 Q. Be both ways for a second?

A. Go both ways the first and then last it would go the way the train was struck. If the cars were struck then they would go back and back and then back again.

Q. The engine wouldn't go back would it?

A. Yes, sir.

Q. It had the spring bumper on the back?

A. Yes, sir.

Q. And you had air on it?

A. Yes, sir.

Q. And when you struck you put on your air?

A. Yes, sir.

Q. You had your engine in back motion?

A. Yes, sir.

Q. Did you turn your lever when you struck?

A. No, sir.

Q. You set there to see if you made the couple?

A. Yes, sir.

Q. Did you hear a negro in the camp cars hollering to your fireman anything about his uncle?

A. I did not.

Q. Negroes all hollder don't they Mr. Strobel?

A. Most of them do.

Q. How long did you say you missed Van Harris before you got down to him?

A. Four or five seconds, something like that.

Q. It couldn't have been four or five minutes?

A. No, no sir.

Q. Why didn't you get the fireman to help take the engine off?

A. It wasn't his duty.

Q. It wasn't his duty?

A. No, sir.

Q. Then it wasn't so much a convenience, but you were looking for somebody convenient?

209 A. Yes, sir; and I wanted somebody to see the position his body was in.

Q. You were going back looking for your conductor?

A. Yes, sir.

Q. Mr. Strobel, when these cars came together you put on your air and stopped your engine didn't you?

A. When they struck, yes sir.

Q. Now, the slack from that stoppal would not run up on your engine till it came back out of the line would it?

A. No.

Q. In other words, your engine wouldn't move till the slack came back out of the balance of the cars would it? How far would your engine move then?

A. I suppose possibly a foot.

Q. And that would move in the opposite direction wouldn't it?

A. Yes, sir; then bring it right back the opposite way, and that is when we always put a brake on to hold them.

Q. When you hit do you put your brake on?

A. Not till the slack is jammed back.

Q. You say you didn't put your brake on when you coupled up there?

A. Never did. That stops the engine.

Q. And you left your engine in motion?

A. The throttle was shut off.

Q. You shut your throttle off as soon as you struck?

A. I always shut the thortile off a box car or two before we strike.

Q. And when you struck you didn't put on your brake?

A. It wasn't necessary.

Q. I didn't ask you what was necessary. I asked you what you did?

A. I didn't.

Q. You didn't put your brake on till the engine moved up?

210 A. No, sir. The slack of the cars came back and moved the engine up this way and then it jerks it back the other way.

Q. How far did it jerk it back on this occasion the other way after it came up?

A. About a foot.

Q. As a matter of fact Van Harris' body was some thirty-six inches under the engine wasn't it?

A. Yes, sir.

Examination by Mr. Bozeman:

Q. Where was his head lying Mr. Strobel with reference to the couple between the engine and car?

A. His head was lying on the east rail.

Mr. Fewell: Why didn't you get that negro who hollered to you to help you get him from under there?

A. No negro hollered to me.

Q. I thought you said awhile ago that a negro hollered to you—

A. Negro in the camp car hollered to me the negro was under the tank.

Q. Why didn't you get him to help you?

A. He don't know nothing about cutting off no train. He is just a cook.

Mr. Bozeman: When you went back there and found Harris' body there, the whole wheel on the right-hand side had run up how far on his body?

A. I suppose seven inches or more.

Q. In his groins here?

A. Yes, sir.

Q. Was he lying with his body right straight back here?

A. Yes, sir.

Q. With his head away from his engine?

A. Yes, sir.

Q. How did that put his head with reference to this coupling between the car and the engine?

A. About under the end of the tank.

211 Q. Let me see if I understand you about that rebound.

Assuming that this book here is the cut of cars and your engine come back here to make a coupling. In this I believe you told Mr. Fewell you were not working under steam, you were just rolling?

A. Rolling?

Q. When that engine first strikes the cars what effect will it have on the cars?

A. They will roll back a little south.

Q. Away from the engine?

A. Yes, sir.

Q. What effect will it have on the engine?

A. Pull the engine back a little bit.

Q. Then what?

A. Back the other way and then slack back against the train and when it slacks back against the train you put your brake on.

Q. Then it will go forward a little and back again?

A. Yes, sir.

Q. And when it settles there you put the brake on?

A. Yes, sir.

Q. Is that the ordinary effect of all these couplings?

A. Yes, sir.

Q. That is the usual way the thing happens?

A. Yes, sir.

Q. You say when Van Harris got down on the ground there did he give you a signal after he got on the ground?

A. Yes, sir.

Q. After you got that signal did he at once disappear from your sight between the cars or did he walk along further?

A. He gave one or two signals before he run in between the cars.

Q. What signals were those?

A. To back up, throwing his hand that way till he went out of sight, supposed to be giving a back up signal.

212 Q. He was still giving a back up signal when you were backing up. Did his getting out of your sight in between the cars there indicate to you that there was any danger to Harris in your letting your engine roll on and make the coupling?

A. No, sir.

Q. You couldn't see him at all?

A. No, sir.

Q. Could you have seen him if he had gone on through and out on the fireman's side?

A. The fireman would have seen him, I couldn't see him.

Q. I said could you have seen him?

A. No, sir.

Q. Did you know where he was when he disappeared, did you know whether he stopped between the cars or went on through?

A. No, sir.

Q. You don't know?

A. No, sir.

Mr. Fewell: Approximately how tall was Harris?

A. I don't know.

Q. Was he as tall as you?

A. No, sir.

Q. Was he as tall as I am?

A. I don't know really well Tom. I reckon he was about your height. He wasn't built like you. He was thin build.

Q. He didn't have this on him?

A. He didn't have that bay-window on him?

Q. About my height?

A. Yes, sir; I reckon so.

Q. About how high am I?

A. About five foot five, something like that.

Mr. Bozeman: You testified on cross-examination that the lever in your engine was left in back motion?

A. Yes, sir.

213 Q. When you made this coupling, up to the time that you got down to look for Harris, I believe?

A. Yes, sir.

Q. I want to ask you, as an engineer, whether or not that was the proper position for him to be in under those circumstances in making that coupling, whether or not that was the proper thing to do was to leave it there?

A. Yes, sir.

Mr. Cameron: What is necessary to be done Mr. Strobel when you go to uncouple a car with an automatic coupler?

A. Raise the lift lever.

Q. Just lift up the lift lever?

A. Yes, sir.

(Witness excused.)

Mr. CHARLIE STROBEL, being reproduced, testified as follows:

Examination by Mr. Bozeman:

Q. Mr. Strobel, when did you make the trip from Meridian down to New Orleans, immediately before Van Harris was hurt?

A. The day before.

Q. Was Van Harris the brakeman on your train?

A. Yes, sir.

Q. Who was your engineer?

A. Fred Strobel.

Q. Did you have this same engine?

A. Yes, sir.

Q. Mr. Strobel, before you became conductor, were you flagman or brakeman yourself?

A. Yes, sir.

Q. You have had experience in coupling cars?

A. Yes, sir.

Q. Using these automatic cars?

A. Yes, sir.

Q. Coupling air brakes?

214 A. Yes, sir.

Q. With this engine having this vestibule on it and the spring plate or bumper, that is just below the frame isn't it?

A. Yes, sir.

Q. If a brakeman desires to couple the air hose between the engine and the car and he waited till the engine come to a stop is there any danger of his coupling the air hose because of this spring bumper?

A. No, sir.

Q. Can he stand up and make that coupling with the air hose?

A. No, sir. He would have to squat down.

Q. How far above the ground is that coupling made when a man reaches down and gets them and couples them, that air hose?

A. After it is coupled it stands about a foot and a half above the ground.

Q. Then, how far was it from the ground up to where you saw that blood on the bumper?

A. About three foot and a half.

Q. Mr. Strobel, what was your leaving time for that train?

A. 5:30.

Q. What time did this accident occur?

A. 5:10.

Q. Was there any hurry, any unusual hurry there about the coupling of that engine up to the train?

A. No, sir.

Q. You had how many minutes left after that coupling before pulling the train out?

A. 20 minutes.

Q. Was there anything else to be done by that engine there before the train left except coupling up to that train?

A. Yes, sir. Pump the air up and get an air test.

Q. Was there any other switching or moving to be made of the engine?

A. No, not at that time, no sir; there wasn't. There was
215 a switch made later of that train, set out a bad order car after the accident occurred.

Q. Was this pumping up of the air, was that done while the engine was standing still?

A. Yes, sir.

Q. How is this engine coupled to a passenger train? Any difference from the way it is coupled to a freight train?

A. Same way.

Q. Now, Mr. Strobel, I will ask you again what I started to ask you when you were on the stand before about what warning if any you had given Van Harris before this accident as to his method of coupling the air hose?

Mr. Fewell: We object to that; we have got to bring it something before the man was killed.

Overruled. Plaintiff excepted.

Q. Just state what if any warning was given him?

A. He coupled the air hose at the same time the engine would couple to the train, or at the same time two cars would couple.

Mr. Fewell: We move to exclude that. That is not responsive to counsel's question.

Overruled.

Question withdrawn.

Q. How long had you known Van Harris as a brakeman? How long had he been a brakeman within your acquaintance of him Mr. Strobel?

A. About a year.

Q. About a year, before his death?

A. Yes, sir.

Q. I will ask you if you had observed during that time any habit of his with reference to the mode of his coupling the air hose between cars or engines and cars and if so what was and what warning if any you gave him about it?

Mr. Fewell: We object.

216 Overruled. The plaintiff excepted.

A. I had got on to him once before about coupling the air hose and engine at the same time and told him if I caught him doing that again, I would certainly put him down he couldn't brake for me.

Q. About doing what?

A. Coupling the air hose and the engine or two cars and the air hose at the same time.

Q. What do you mean by that?

A. He would get hold of the air hose that was standing still and when the other car was coming back he would grab that air hose and the same time that the drawhead would couple he would couple that air hose.

Q. Was that the proper way to couple it or improper?

A. Improper.

Q. Was that a dangerous way or not?

A. Very dangerous.

Q. What was the proper way to couple it?

A. Wait till your car or engine stopped and then walk in and couple your air hose.

Q. What did you say to Van about him going in there and coupling the cars—

Mr. Fewell: We object to that as repetition.

Which objection was by the Court sustained; to which action and ruling of the Court the defendant then and there excepted.

Q. How long was that before his death you had that round with him?

A. It was about a month.

Q. In coupling up this air hose a man is down and sorter beneath the coupling isn't he?

A. Yes, sir.

Q. That would throw his head where with reference to the coupling, underneath the coupling, wouldn't it Charlie?

217 A. Standing still, it would.

Q. He would be leaning down and under this coupling how much over it?

A. You couldn't make it by leaning over.

Q. The only way of making it was by leaning down under it?

A. Yes, sir.

Q. That could put his head under the drawhead?

A. Yes, sir.

Mr. Bozeman: If he had been leaning down under the coupling at the time of the accident could this spring bumper on the engine and this rod on the coupling apparatus have struck him?

A. Yes, sir; if he didn't get down low enough.

A. I say if his head was under the bumper would that have struck him?

A. No, sir.

Q. Did his head have to be as high as the bumper above for this spring bumper on the engine to have struck him?

A. Yes, sir.

Q. There is one question I forgot to ask you: Did you notice what kind of an injury or wound this man had on his head after he was struck there?

A. I noticed the blood on his head was all.

Q. Did you feel his head?

A. No, sir.

Q. Where was the blood on his head?

A. On this side, right about here.

Q. That is on the right side?

A. Yes, sir.

Q. Just above his head?

A. Yes, sir.

Q. Was it forward or back of his ear?

A. It seems to me like it was right over his ear.

218 Q. Right on the right side about an inch or two above his ear?

A. Yes, sir.

Q. That is where the blood was?

A. Yes.

Q. Did you see any blood anywhere else?

A. There was blood on his body.

Q. You didn't see any other blood about his head?

A. No, sir.

Q. Did you notice the track there where he was injured to see whether or not there was any sign of a man being injured by being drug?

A. No, sign there.

(Witness excused.)

Defendants here rested.

Plaintiff here rested.

The end of the testimony.

I, J. L. Ward, Official Court Stenographer for the Tenth Judicial District of Mississippi do hereby certify that the foregoing pages contain a true and correct transcript of my stenographic notes taken on the trial of the cause therein set forth in the caption hereof.

I also certify that I have this day notified Messrs. Fewell & Cameron and A. S. Bozeman that the said transcript of my stenographic notes has this day been filed with the Clerk of the Circuit Court of Lauderdale County, Mississippi. Said notice was given to said attorneys by and through the United States Mail with proper postage prepaid, and addressed to said parties at their usual place of residence, which is Meridian, Miss.

Witness my hand this the 8th day of January, A. D. 1915.

J. L. WARD,
Court Stenographer.

219

Plaintiff's Given Instructions.

Filed October 8, 1914. R. L. Harbour, Clerk.

CHENEY HARRIS, Admx.,

v.

NEW ORLEANS & NORTH EASTERN R. R. Co.

No. 1. The Court charges the jury for the Plaintiff in this case that under the Rule of Evidence in the State of Mississippi all that is required of the Plaintiff in this case is to prove that injury was

inflicted by the movement of the defendant's train or engine and then the law presumes negligence and then the burden of proof shifts to the defendant to prove all of the facts and circumstances surrounding the injury and from those facts so shown exonerate itself from all negligence.

No. 2. The Court charges the jury for the Plaintiff that under the rule of evidence under the Mississippi statutes known as the prima facie statute all that the Plaintiff need prove to entitle her to a judgment or verdict is that the defendant's engine or train caused the injury complained of and then the Plaintiff is entitled to a verdict at the hands of the jury unless the defendant has shown all of the facts surrounding the injury and from such facts has shown by a preponderance of the evidence that its servants were not guilty of negligence.

No. 3. The Court charges the jury for the Plaintiff that if you believe from the evidence that deceased was injured by the running of defendant's engine, then the burden placed on defendant by the prima facie statute cannot be met or overcome by mere speculation or conjecture, but it devolves on defendant the duty of showing by a preponderance of the evidence all of the facts and circumstances surrounding the injury and by such proof thus exonerate itself from negligence.

No. 4. The Court charges the jury for the Plaintiff in this case that under the law contributory negligence is no complete
220 defense to this suit and that if the jury believe from the evidence that the defendant or its servants were guilty of some negligence proximately resulting in the death of Van Harris then that the fact, if it be a fact, that the deceased was guilty of contributory negligence is only to be considered by the jury in minimizing the damages and is no complete defense to the right to recover and that the burden of proof rests upon the defendant to prove by a preponderance of the evidence that the deceased was guilty of contributory negligence.

No. 5. The Court charges the jury for the Plaintiff that the servant only assumes the ordinary risks of his employment not due to the negligence of the master or to the negligence of other servants and that the burden of proof is upon the defendant to show by a preponderance of the evidence that the plaintiff's intestate came to his death through some risk ordinarily assumed by such employee and not through the negligence of the master or other employees.

No. 6. The Court charges the jury for the Plaintiff that under the law, contributory negligence of the deceased is no defense to this suit and if the jury believe from the evidence that the deceased was injured by the running of the defendant's engine or train and that said injuries resulted in his death, then the fact if it be a fact, that the deceased was negligent and that said negligence contributed to his injuries, is only to be considered by you in mitigation of damages, that is to say, if you believe from the evidence that the deceased was guilty of contributory negligence, then you have a right to take same into consideration and lessen the amount of damages that you would otherwise have allowed, had the deceased not

been guilty of contributory negligence and the Court further instructs you that the burden of proving contributory negligence of the deceased is on the defendant and before you are warranted
 221 in finding that the deceased was guilty of contributory negligence the defendant must prove same to your satisfaction by a preponderance of the evidence.

No. 7. The Court charges the jury for the Plaintiff in this case that if the jury believe from the evidence that the deceased, Van Harris, while a brakeman for the defendant signalled the engineer of the train to back up until the coupling between the engine and car was made and that then the engine was stopped and that the deceased then went in between the cars and undertook to couple up the air hose between the engine tank and the front car and that while in this position and without any signal being given by him to the engineer the engineer in charge of said train without sounding his bell and without exercising ordinary care in the premises then moved said engine again and that as a consequence of said movement of the engine the deceased was caught and knocked down and killed then the sworn duty of the jury is to find a verdict for the Plaintiff.

No. 8. The Court charges the jury for the Plaintiff in this case that if your verdict shall be for the Plaintiff then it should be in such sum as you may believe from the evidence would fully compensate the deceased for his pain and suffering, if any have been shown by the evidence, and the value of his life reckoned according to the American Mortality table had the deceased survived and that such amount or the measure of same is peculiarly within the province of the jury reckoned as above outlined. And that the law does not require the Plaintiff to prove the damages in dollars and cents but the amount thereof is to be fixed by the jury in all not to exceed the sum of Ten Thousand Dollars.

No. 9. The Court charges the jury for the Plaintiff that in event your verdict is for the Plaintiff then it should be in the following form: "We the jury find for the Plaintiff Cheney Harris,
 222 Administratrix, and assess the damages at — Dollars." In all not to exceed the sum sued for.

223

Plaintiff's Refused Instructions.

Filed October 8, 1914. R. L. Harbour, Clerk.

CHENEY HARRIS, Adm'x,

v.

NEW ORLEANS & NORTH EASTERN R. R. Co.

The Court charges the jury for the plaintiff that they the jury have no concern with the distribution of whatever sum the jury may find as damages in this case and that such matter is beyond their control in this case.

The Court charges the jury for the Plaintiff that if the jury believe from the evidence that Van Harris was killed by the movement of the defendant's engine or cars and the evidence leaves in the

minds of the jury a reasonable doubt as to just how his death was brought about, or there are two reasonable theories arising from the evidence or the lack of evidence as to the facts and circumstances surrounding the death of said Van Harris, both of equal weight then under the law the defendant has failed to meet the *prima facie* statute of Mississippi and your verdict should be for the Plaintiff.

The Court instructs the jury to find for the Plaintiff.

224

Defendant's Given Instructions.

Filed October 8, 1914. R. L. Harbour, Clerk.

CHENEY HARRIS, Adm'x,

v.

NEW ORLEANS & NORTH EASTERN R. R. Co.

No. 1. The Court further instructs the jury for the defendant that if you believe from the evidence that Van Harris' injury and death were caused solely by his own negligence or want of care, then it is your duty to return a verdict for the defendant.

No. 2. The Court further instructs the jury for the defendant that in accepting employment as brakeman for the defendant in interstate commerce Van Harris assumed all the risks that were incident to the performance of his duties as brakeman, which were not the result of defendant's negligence or defendant's violation of the Federal Statutes requiring the engines and cars operated by it to be equipped with automatic couplers and other safety appliances. And if you believe from the evidence that Harris went in between the engine and car to couple the air hose while the engine was moving, then he assumed the risk incident thereto, and the plaintiff is not entitled to recover in this case unless the evidence shows that the engineer was negligent in operating the engine, and that this was the proximate cause of Harris' injury and death.

No. 3. The Court instructs the jury for the defendant that where eye witnesses testify before the jury how the accident and injury occurred, it is the duty of the jury to find whether the defendant was negligent or not and whether such negligence was the proximate cause of the injury and death or not from the evidence before them and not from any statutory presumption created by the laws of Mississippi.

No. 4. And the court further instructs you that in case of a conflict in the testimony of the eye witnesses as to how the
225 accident occurred, you cannot resort to any statutory presumption of negligence in aid of the plaintiff's testimony, but must determine whether the defendant was negligent or not from the testimony of the witnesses, and unless the greater weight of the evidence shows that the defendant's negligence was the proximate cause of the injury and death of Van Harris, then you should find for the defendant.

No. 5. The Court instructs the jury for the defendant that the

defendant railroad company is not an insurer of the lives of its employees but is only under the duty to exercise reasonable care to avoid injuring them. And while in this case the defendant Railroad Company was under the duty to exercise reasonable care in the operating of its trains to avoid the injury of Van Harris, at the same time Van Harris was also under the duty to exercise reasonable care for his own safety. And if the jury believe from the evidence that the Railroad Company and its engineer exercised reasonable care in this case in the operation of its train with reference to the safety of Van Harris but that the said Van Harris was injured by reason of his own negligence in going in between the cars while in motion to couple an air hose, then the plaintiff is not entitled to recover and you should find for the defendant.

No. 6. The Court further instructs the jury that if you believe from the evidence that Harris' injury rendered him immediately unconscious of any pain or suffering, then the plaintiff cannot recover any sum for pain and suffering endured by him.

No. 7. The Court further instructs the jury that under the Federal Employers' Liability Act, which controls in this case, the plaintiff is not entitled to recover any damages by way of solace for the grief of the relatives of Harris on account of his death.

No. 8. And the court further instructs you that the
226 air hose are no part of the automatic couplers required by the

Federal Safety Appliance Acts, and those acts do not require the defendant to so equip its cars that the air hose may be coupled without having to go in between the cars, and the mere fact that Harris had to go in between the cars to couple the air hose does not entitle the plaintiff to recover in this case.

No. 9. The Court instructs the jury that the Mortality tables offered in evidence are merely to aid you and not to control you as to the expectancy of life of Van Harris. Each man's expectancy varies with his occupation and surroundings, and the dangers to which he may be exposed, and there is no certainty that any man will live the average duration of life.

No. 10. The Court instructs the jury that the evidence in this case shows that the engine and car in question, at the time of the injury, were equipped with automatic couplers and safety appliances as required by the Acts of Congress, and you are not authorized to find that any violation by defendant of any statute enacted for the safety of employees contributed to or caused the injury or death of Van Harris.

No. 11. And the Court further instructs you that unless you believe from the evidence that the defendant's engineer was negligent in the operation of the engine when making the coupling with the car and that this was the proximate cause of Harris' injury and death, then you should find for the defendant.

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Defendant's Refused Instructions.

Filed October 8, 1914. R. L. Harbour, Clerk.

CHENEY HARRIS, Adm'x,

v.

NEW ORLEANS & NORTH EASTERN R. R. Co.

1. The Court instructs the jury for the defendant that there can be no recovery in this case under the Act of Congress known as the Employers' Liability Act in the absence of negligence on the part of the defendant, and the burden is upon the plaintiff under this act to prove to your satisfaction by a preponderance of the evidence that the proximate cause of the injury and death of Van Harris was either the negligence of the defendant in failing to have the engine and car in question equipped with automatic couplers so that the engine and car could be coupled together without Harris having to go in between them, or the negligence of the engineer in the operation of the engine at the time and place of injury, and unless the plaintiff has shown this to your satisfaction by the greater weight of the testimony it is your duty to return a verdict for the defendant.
2. The Court instructs the jury for the defendant that the evidence shows that Van Harris left a widow surviving him, and the plaintiff is not authorized to recover in this case any damages for the benefit of the mother of Harris, or to compensate her for the loss of his support.
3. The Court instructs the jury for the defendant that if you believe from the evidence that Van Harris' injury rendered him unconscious instantaneously and that he died from his injury without having ever regained consciousness, then he had no right of action under the Federal Employers' Liability Act which survived to plaintiff and she is not entitled to recover any damages for his pain and suffering, or for any damages suffered by him.
4. The Court instructs the jury for the defendant that if you should return a verdict for the plaintiff it is your duty to specify in your verdict the beneficiaries who are to participate in any damages that you may award, and also what damages you award in favor of each of them.
- 228 5. The Court instructs the jury for the defendant that under the Federal Employers' Liability Act which controls in this case the plaintiff cannot recover unless she shows by the greater weight of the evidence that the proximate cause of the injury and death of Van Harris was the negligence of the defendants or its employees in the operation of the engine or in failing to equip the engine and car with automatic couplers.
6. And the Court further instructs you that you are not authorized under this Act to presume from the mere proof that Harris was injured by the running of the engine or cars of the defendant that the proximate cause of his injury and death was the negligence of the defendant or its employees, but you must determine whether the

defendant was negligent or not from all the facts and circumstances in evidence, and unless you believe from the greater weight of all the evidence that the negligence of defendant was the proximate cause of Harris' injury and death, then it is your duty to find for the defendant.

7. The Court instructs the jury for the defendant, that the testimony in this case fails to show any liability of defendant to the plaintiff under the Act of congress known as the Employers' Liability Act, and you will find for the defendant.

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Verdict of the Jury.

Filed October 8, 1914. R. L. Harbour, Clerk.

CHENEY HARRIS, Adm'x,

v.

NEW ORLEANS & NORTH EASTERN R. R. Co.

"We the jury find for the plaintiff in the sum of Two Thousand dollars (\$2,000).

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Verdict and Judgment of the Court.

Filed October 8, 1914. R. L. Harbour, Clerk.

CHENEY HARRIS, Adm'x,

v.

NEW ORLEANS & NORTH EASTERN R. R. Co.

This cause coming on this day to be heard, came the parties by counsel and in person, the issue having been joined, came a jury of good and lawful men to-wit: A. J. Kelly and eleven others, who being sworn to try the issue and who having heard the testimony, received the instructions of the Court and heard argument of counsel, retired to consider of their verdict and presently returned into open Court the following verdict: "We the jury find for the Plaintiff in the sum of Two Thousand Dollars (\$2,000)."

It is therefore ordered and adjudged that the plaintiff Cheney Harris, administratrix, do have of and recover from the defendant, the New Orleans & North Eastern Railroad Company, a corporation, the sum of Two Thousand Dollars (\$2,000.00) together with all costs in this behalf expended, for which let execution issue.

231

Defendant's Motion for a New Trial.

Filed October 31, 1914. R. L. Harbour, Clerk.

CHENEY HARRIS, Adm'x,

v.

NEW ORLEANS & NORTH EASTERN RAILROAD Co.

Comes the defendant and moves the court to set aside the verdict and judgment for \$2,000.00 rendered against it on the 8th day of

October, 1914, a previous day of this term, and to grant it a new trial, and assigns the following causes:

1. The court erred in admitting testimony offered by the plaintiff and objected to by the defendant, as shown by the stenographer's notes.

2. The court erred in excluding testimony offered by the defendant and objected to by the plaintiff, as shown by the stenographer's notes.

3. The court erred in overruling the defendant's motion to exclude all of the testimony offered by the defendant and to grant it a peremptory instruction.

4. The court erred in refusing the peremptory instruction asked by the defendant.

5. The court erred in giving each and all of the instructions numbered from 1 to 9, inclusive, asked by the plaintiff and given by the court.

6. The court erred in refusing instructions numbered 2, 3, 4, 5, 6, 7, and 8, and each of them asked by the defendant and refused by the court.

7. In refusing the peremptory instruction asked by the defendant and in refusing instructions 2 to 8, inclusive, and each of them, asked by the defendant and refused by the court, and in giving instructions 1 to 9, inclusive, and each of them, asked by the plaintiff and given by the court, the court erroneously denied to the defendant rights claimed by it under the Constitution and Statutes of the United States, and particularly the Act of Congress known
232 as the Employers' Liability Act.

8. The verdict is contrary to the law and the evidence.

A. S. BOZEMAN,
Attorney for Defendant.

Order Overruling Defendant's Motion for a New Trial.

CHENEY HARRIS, Adm'x,

v.

NEW ORLEANS & NORTH EASTERN RAILROAD CO.

On hearing the motion of the defendant to set aside the verdict and judgment heretofore rendered in this case and for a new trial, it is considered by the court that the said motion be and the same is overruled, to which action of the court the defendant excepts.

233 *Defendant's Petition for an Appeal to the Supreme Court.*

Filed December 18, 1914. R. L. Harbour, Clerk.

CHENEY HARRIS, Adm'x,

v.

NEW ORLEANS & NORTH EASTERN RAILROAD COMPANY.

To the Clerk of the Circuit Court of Lauderdale County:

The defendant being aggrieved at the judgment for \$2,000.00 rendered against it herein on the 8th day of October, 1914, at the

September Term of the Circuit Court of Lauderdale County, prays an appeal from said judgment, with supersedeas, to the Supreme Court of Mississippi, and tenders herewith its appeal bond in the penalty of \$4,000.00.

A. S. BOZEMAN,
Attorney for Defendant.

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Appeal Bond to Supreme Court.

THE STATE OF MISSISSIPPI,
Lauderdale County:

Know All Men by These Presents:

That we, New Orleans & Northeastern Railroad Company, Principal, and United States Fidelity & Guaranty Company, Surety, are held and firmly bound unto Cheney Harris, Administratrix of the estate of Van Harris, deceased, in the penal sum of Four Thousand and No/100 Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, the 17th day of December, A. D., 1914.

That condition of the above obligation is such, That, whereas, in a case lately pending in the Circuit Court of Lauderdale County, wherein said Cheney Harris, Administratrix, was Plaintiff, and said New Orleans & Northeastern Railroad Company Defendant, a judgment was rendered on the 8th day of October 1914, a day of the September Term, 1914, of said Circuit Court of said County, in favor of said Cheney Harris, Administratrix, against said New Orleans & Northeastern Railroad Company, Defendant, for the sum of Two Thousand Dollars and the said New Orleans & Northeastern Railroad Company conceiving itself aggrieved thereby hath prayed for and obtained an appeal to revise and reverse said judgment returnable to the next Term of our Supreme Court.

Now, therefore, if the said obligators shall pay and satisfy the judgment of the Supreme Court and all costs of said appeal, and of the Court below, in case the judgment be affirmed, then this obligation to be void, otherwise to remain in full force and effect.

NEW ORLEANS & NORTHEASTERN RAIL-
ROAD CO., [SEAL.]

By A. S. BOZEMAN, *Attorney.*

UNITED STATES FIDELITY & GUARANTY
CO., [SEAL.]

By W. V. LUDLOM, *Attorney in Fact.*

235

Citation to Supreme Court.

THE STATE OF MISSISSIPPI:

To the Sheriff of Lauderdale County, Greeting:

Whereas, on the 8th day of October, 1915, A. D. by Judgment of our Circuit Court of Lauderdale County, in the aforesaid State,

Cheney Harris, Administratrix, Plaintiff recovered judgment against New Orleans & Northeastern Railroad Company, Defendant, for the sum of Two Thousand, (\$2,000) Dollars, besides the cost of suit; and the said New Orleans and Northeastern R. R. Co. having prayed and obtained an appeal returnable unto our Supreme Court at Jackson, on the first Monday of March, next, and having given bond for Supersedeas:

We command you to cite the said Cheney Harris, Adm'x, or Fewell & Cameron, Attorneys of Record, to appear then and there in and before said Supreme Court to defend the said appeal and have then and there this precept before our said Supreme Court.

Witness, the Hon. Sydney M. Smith, Chief Justice of our Said Supreme Court, the first Monday of March, 1915, A. D.

Witness, also, R. L. Harbour, Clerk of our said Circuit Court, and the seal of his Court affixed, the 11th day of January, 1915, A. D.

R. L. HARBOUR, Clerk. [SEAL.]

Sheriff's Return.

I have this day executed the within process by personally delivering to T. G. Fewell, member of the firm of Fewell and Cameron, Attorneys of Record for Chaney Harris; a true copy hereof, this the 11th day of January, 1915.

J. H. KENNEDY, Sheriff,
By J. P. YOUNG, D. S.

236 & 237 STATE OF MISSISSIPPI,
Lauderdale County:

I, R. L. Harbour, Clerk of the Circuit Court, in and for aforesaid County and State, hereby certify that the foregoing transcript contains a true and correct copy of the Record, Judgment and other proceedings had upon the trial of the within cause, styled Cheney Harris, Administratrix, v. New Orleans & Northeastern Railroad Company, tried at the September, 1914, Civil Term of the Circuit Court of Lauderdale County, Mississippi.

Witness my hand and Seal of Office, this the 11th day of January, 1915.

R. L. HARBOUR, Clerk. [SEAL.]

238 In the Supreme Court of Mississippi, First District.

No. 18049.

NEW ORLEANS & NORTH EASTERN RAILROAD COMPANY

v.

CHENEY HARRIS, Administratrix.

Assignment of Errors.

The appellant, The New Orleans & North Eastern Railroad Company, shows to the Court that there are divers errors to its prejudice

apparent of record herein, wherefore it hath appealed to this Court, and for causes of reversal of the judgment appealed from it assigns the following the most flagrant of said errors, towit:

First. The Court below erred in overruling the demurrer of the defendant (record page 10) to the first count of the plaintiff's declaration.

Second. The Court below erred in overruling the defendant's demurrer (record, page 11) to the second count of the plaintiff's declaration.

Third. The Court below erred in overruling the defendant's demurrer (record, page 10) to the third count of the declaration.

Fourth. The Court below erred in overruling the defendant's Motion, made, when the plaintiff rested her case, to exclude all the testimony introduced by the Plaintiff and for a peremptory instruction in defendant's behalf (record, page 111) because the proof failed to make out a case under the Federal Employers' Liability Act, and because it was affirmatively shown that the deceased, Van Harris, for whose death the suit was brought, left surviving himself a widow, and the plaintiff had no right to recover anything for the mother of the said Van Harris, the only beneficiary of the suit named in the declaration.

Fifth. The Court below erred in admitting testimony offered by the plaintiff and objected to by the defendant, a bill of particulars of which ruling is hereto attached and made a part of this assignment.

Sixth. The Court below erred in excluding testimony offered by the defendant and objected to by the plaintiff, a bill of particulars of which is hereto attached and made a part of this assignment.

Seventh. The Court below erred in overruling the defendant's motion made when all the testimony had been introduced, to grant it a peremptory instruction.

Eighth. The Court below erred in refusing the peremptory instruction asked by the defendant.

Ninth. The Court below erred in giving each and every one of the instructions granted at the request of the plaintiff; this assignment is directed to each of said instructions separately and not to them jointly. In granting the instructions, and each of them, giving in charge to the jury the Mississippi prima facie statute (Code 1906 #1985 as amended) the trial Court denied appellant its rights under the Constitution and Laws of the United States, and violated the Federal Statute known as the Employers' Liability Act.

Tenth. The Court below erred in refusing each of the instructions asked by the defendant and refused by the Court; this assignment is directed to each of said instructions separately and not to them jointly.

Eleventh. The Court below erred in that it denied to the defendant rights to which it was entitled under the Constitution, Laws and Statutes of the United States, and particularly under the Act of Congress known as the Employers' Liability Act.

Twelfth. The Court below erred in overruling the Motion of the defendant for a new trial.

Thirteenth. The Court below erred in refusing to vacate and annul the verdict because the same is unjust, wrong and oppressive, and not supported by the testimony.

Fourteenth. Divers other reasons to be made known on the hearing.

The appellant prays for the reversal of the judgment appealed from and the award to it by this Court of a final judgment in its favor, dismissing the suit.

If, however, the Court shall deem itself powerless to award a final judgment in appellant's favor, then, and in that event, it prays a reversal of the decree appealed from and the award to it of a new trial.

And as in duty bound will ever pray.

ALBERT S. BOZEMAN,
R. H. & J. H. THOMPSON,
FULTON THOMPSON,
Appellant's Attorneys.

A copy of the above and foregoing assignment of error has this day been forwarded by mail, postage prepaid, to Mess.
240 Fewell & Cameron, attorneys, for appellee, addressed to them at their usual post office, Meridian, Miss. Done M'ch 4, 1915.

R. H. THOMPSON,
Of Counsel for Appellant.

Bill of Particulars under the Fifth Assignment of Error.

The Court below erred in admitting in evidence on plaintiff's offer of the same, over defendant's objection, the book, called the American Experience Table of Mortality, produced by plaintiff's witness, Dement.

R. H. THOMPSON,
Of Counsel for Appellant.

Endorsed: Received and filed Mar. 4, 1915. Geo. C. Myers, Clerk, by W. J. Brown, D. C.

241 March Term, 1916, June 5th, 1916.

18049.

NEW ORLEANS & NORTH EASTERN R. R. COMPANY

v.

CHENEY HARRIS, Adm'x.

This cause having been submitted on a former day of this term on the record herein from the Circuit Court of Lauderdale County, and this Court having sufficiently examined and considered the same

and being of opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause at the September term, 1914 on the 8th day of October, 1914, be and the same is hereby affirmed and that appellee do have and recover of appellant and The U. S. Fidelity & Guaranty Company, surety in the supersedeas bond the sum of Six Hundred and Twenty Five Dollars, the amount of the judgment in the Court below, together with the further sum of Thirty One and 25/100 Dollars, being damages at the rate of Five per centum as allowed by law, as well as interest on the amount of said judgment from date of rendition till paid at the rate of Six per centum per annum, and also the costs of this cause in this Court and in the Court below, to be taxed, &c.

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In the Supreme Court of Mississippi.

No. 18049.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY, Appellant,

v.

CHENEY HARRIS, Administratrix, Appellee.

Petition for Writ of Error to the United States Supreme Court.

To the Honorable Sydney Smith, Chief Justice of the Supreme Court of Mississippi:

The New Orleans & Northeastern Railroad Company and the United States Fidelity & Guaranty Company of Baltimore, petitioners, present this their petition for a writ of error to the Supreme Court of the United States in the Above entitled cause and respectfully show that on the 5th day of June, 1916, the Supreme Court of the State of Mississippi rendered a final judgment for the principal sum of two thousand dollars, adding thereto a statutory penalty, one hundred dollars, and interest on the principal, one hundred and ninety-nine dollars, and ninety-one cents, aggregating two thousand two hundred and ninety-one dollars and ninety-one cents and cost in favor of Cheney Harris, administratrix, etc., the appellee in the above entitled case, and against the New Orleans & Northeastern Railroad Company, the appellant therein, and against the petitioner, the United States Fidelity & Guaranty Company of Baltimore, the surety of the petitioner the New Orleans & Northeastern Railroad Company, on its appeal bond, whereby the said case was appealed from the state court of original jurisdiction to the Supreme Court of Mississippi, and by its said final judgment the Supreme Court of Mississippi awarded execution thereon against your petitioner in the above entitled cause, wherein the said Cheney Harris, administratrix, was plaintiff and your petitioner, the New Orleans & Northeastern Railroad Company, was defendant, and your petitioner, the United States Fidelity & Guaranty Company of Baltimore, was surety, as aforesaid, on its co-petitioner's appeal bond, and after

wards, to-wit: on the 19th day of June, 1916, the said Supreme Court of Mississippi overruled and denied your petitioner's, the New Orleans and Northeastern Railroad Company's suggestion of error in said cause, all of which will appear by reference to the record and proceedings in said cause, the same being numbered 18049 on the docket and record of the Supreme Court of Mississippi, which last mentioned court is the highest court of the state in which a decision in said suit, or any other, can be had.

Your petitioners claim the right to remove said judgment to the Supreme Court of the United States by writ of error under Section 237 of the Judiciary act, Statutes at Large of the United States, Vol. 36, p. 1156, because there was drawn in question in said case the true construction of an act of Congress, commonly called the Federal Employers' Liability Act, 35 Statutes at Large, page 65, approved April 22, 1908, and of the acts of Congress amending same; and the Supreme Court of Mississippi denied petitioners, as we respectfully submit, their rights, privilege and immunity under said acts of Congress in this, that it failed and declined to hold that it was error prejudicial to petitioner railroad company for the trial court to have given in charge to the jury, as was done, instructions on the trial of the case, propounding a statute of Mississippi, commonly called the prima facie statute, Mississippi Code 1906, Section 1985, as amended Laws Mississippi 1912, page 290, ch. 215, which statute relates to the burden of proof and provides that in all actions against railroad corporations and other corporations, companies, etc., using engines, locomotives or cars of any kind propelled by the dangerous agencies of steam, gas, gasoline or lever power, and running on tracks, for damages done to person or property, that proof of injury inflicted by the running of the engines, locomotives or cars of any railroad corporation or company shall be prima facie evidence of the want of reasonable skill and care of such railroad corporation or company; whereas, as petitioners believe and insisted and now insist that in this suit brought under the Federal Employers' Liability Act it was prejudicially erroneous to your petitioner, the New Orleans & Northeastern Railroad Company, for said state statute to have been given in charge to the jury, and your petitioners believe and respectfully suggest that the rightfulness of the giving of said instructions presents a Federal question, pure and simple, and one which should be finally determined by the Supreme Court of the United States.

244 And the said judgment of the Supreme Court of Mississippi denied the appellant, the New Orleans & Northeastern Railroad Company, its rights and privileges under said Federal Statute and under the Constitution and laws of the United States; especially does the Supreme Court of Mississippi, it is respectfully submitted, in violation of said statute and of the Fourteenth Amendment of the Constitution of the United States providing that no state shall deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law; all of which appears, it is respectfully submitted, in the

record of the proceedings of the Supreme Court of Mississippi in said cause, which record is herewith submitted.

Wherefore, petitioners pray the allowance of a writ of error with supersedeas, returnable in the Supreme Court of the United States, and for citation and supersedeas. Especially presented herewith an assignment of error to be presented and urged in the Supreme Court of the United States.

And as in duty bound petitioners will ever pray.

NEW ORLEANS & NORTHEASTERN
RAILROAD CO., *Petitioner,*

By ROBERT H. THOMPSON,
Its Attorney of Record.

UNITED STATES FIDELITY & GUAR-
ANTY CO., *Petitioner,*

By ROBERT H. THOMPSON, *Its Attorney.*

245 Let the writ of error with supersedeas issue as prayed for in above petition.

Given under my hand this the 5th day of July, 1916.

SYDNEY SMITH,
*Chief Justice of the Supreme Court
of the State of Mississippi.*

246 THE UNITED STATES OF AMERICA,
State of Mississippi, County of Hinds:

Know all men by these presents, That we, the New Orleans & Northeastern Railroad Company and the United States Fidelity & Guaranty Company of Baltimore, as principals, and Fidelity and Deposit Co. of Maryland, a surety company authorized by the laws of the United States — of the State of Mississippi to become surety upon appeal bonds, as surety, are held and firmly bound unto Cheney Harris, administratrix of the estate of Van Harris, deceased, in the penal sum of Five Thousand Dollars (\$5,000.00), to be paid to the said obligee, her heirs, executors, administrators or successors and to the payment of which well and truly to be made we bind ourselves and our successors jointly and severally firmly by these presents, sealed with our seals and dated this the 3 day of July, 1916.

The condition of this obligation is such that whereas the above named plaintiffs in error, the New Orleans & Northeastern Railroad Company, and the United States Fidelity & Guaranty Company of Baltimore, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered by the Supreme Court of Mississippi in the case numbered 18049 on the docket and in the records of the last mentioned court, wherein Cheney Harris, administratrix of the estate of Van Harris, deceased, is plaintiff and the said railroad company is defendant and the United States Fidelity & Guaranty Company of Baltimore was its surety on its appeal bond, by which the case was carried from the state court of original Jurisdiction to the said state Supreme Court,

and the judgment of said state Supreme Court was a joint one against both of the principal obligators herein.

Now, if the above named plaintiffs in error, the New Orleans & Northeastern Railroad Company and the United States Fidelity & Guaranty Company of Baltimore shall prosecute the said writ
247 of error to effect and answer all costs and damage, if they shall fail to make good their plea, *they* this obligation shall be void, otherwise it shall remain in full force and effect.

NEW ORLEANS & NORTHEASTERN
RAILROAD CO.,

By ROBERT H. THOMPSON,

Its Attorney of Record.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY OF BALTIMORE,

By ROBERT H. THOMPSON,

Its Attorney of Record.

[Seal of Fidelity & Deposit Co.]

FIDELITY & DEPOSIT CO. OF MARY-
LAND, *Surety.*

J. C. HOOD, *Att'y in Fact.*

The above bond and sureties approved July 5th, 1916.

SYDNEY SMITH,

Chief Justice of Supreme Court of Mississippi.

248

Power of Attorney.

Fidelity and Deposit Company of Maryland.

Home Office: Baltimore, Maryland.

Know all Men by These Presents:

That the Fidelity and Deposit Company of Maryland, by Fred S. Axtell, its Vice-President, and Edwin Warfield, Jr., its Assistant Secretary, in pursuance of authority granted by Article VI, Section 3, of the By-laws of said Company, a copy of which section is hereto attached, does hereby nominate, constitute and appoint J. C. Hood, of the City of Jackson, State of Mississippi, its true and lawful agent and attorney in fact, to make, execute, sell and deliver for and on its behalf, as surety, and as its act and deed, any and all bonds and undertakings required in the State of Mississippi. And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Maryland, in their own proper persons.

I witness whereof, the said Fred S. Axtell, Vice-President, and Edwin Warfield, Jr., Assistant Secretary, have hereunto subscribed

their names and affixed the Corporate Seal of the said Fidelity and Deposit Company of Maryland, this 25th day of January, A. D. 1916.

[SEAL.]

FRED S. AXTELL,
Vice-President.

Attest:

E. WARFIELD, Jr.,
Assistant Secretary.

STATE OF MARYLAND,
City of Baltimore, ss:

On this 25th day of January, A. D. 1916, before the subscriber, a notary public of the State of Maryland, in and for the City of Baltimore, duly commissioned and qualified came Fred S. Axtell, Vice-President, and Edwin Warfield, Jr., Assistant Secretary, of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in and who executed, the preceding instrument, and, they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself depose and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signature as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at the City of Baltimore, the day and year first above written.

[NOTARIAL SEAL.]

WM. M. RENIHARDT,
Notary Public.

Commission expires May 1st, 1916.

Extract from By-Laws of the Fidelity and Deposit Company of Maryland, Adopted by the Stockholders of said Company on January 19th, 1915.

"Article VI, Section 3.—The President, or any of the Vice-Presidents, elected by ballot from the members of the Board of Directors shall have power by and with the concurrence of the Secretary or any one of the Assistant Secretaries or Additional Assistant Secretaries, to appoint any attorney-in-fact or to authorize any person or persons to execute on behalf of the Company any bonds, recognizances, stipulations, undertakings, deeds, releases or mortgages, contracts, agreements and policies and to affix the seal of the Company thereto."

250 I, Edwin Warfield, Jr., Assistant Secretary of the Fidelity and Deposit Company of Maryland, hereby certify that the foregoing is a true copy of Article VI, Section 3, of the By-Laws of said Company, and is still in force.

In testimony whereof, I have hereunto subscribed my name as Assistant Secretary, and affixed the Corporate Seal of the Fidelity and Deposit Company of Maryland, this 25th day of January, A. D. 1916.

[CORPORATE SEAL.]

E. WARFIELD, JR.,
Assistant Secretary.

251 In the Supreme Court of the United States.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY et al.,
Plaintiffs in Error,

v.

CHENEY HARRIS, Administratrix of the Estate of Van Harris, Deceased, Defendant in Error.

Assignment of Errors.

Writ of Error to the Supreme Court of Mississippi.

The plaintiffs in error, the New Orleans & Northeastern Railroad Company and the United States Fidelity & Guaranty Company of Baltimore, show to the court that there are manifest errors prejudicial to them, apparent of record in the proceedings, decisions and final judgments of the Supreme Court of the State of Mississippi in the above entitled matter and case in this, to wit:

First. The Supreme Court of Mississippi erred in deciding and holding that the giving in charge to the jury by the court of original jurisdiction of the statute of the State of Mississippi, Mississippi Code 1906, section 1985, as amended Laws of Mississippi 1912, page 290, ch. 215, providing that in suits against railroad companies for injury to person or property proof that the injury was inflicted by the running of the cars or locomotives of the defendant company should be prima facie evidence of liability, and placing the burden of proof to show non-liability on the defendant company, was not error prejudicial to the railroad company, plaintiff in error. And it so erred because this was a suit, as shown of record, brought under the Act of Congress, commonly denominated the Employers' Liability Act, 35 U. S. Statutes at Large, 65, and the act of Congress amendatory thereof, by which ruling the Supreme Court of Mississippi disregarded the manifest purpose of Congress that the said acts of Congress should be uniformly construed and enforced in suits brought thereunder in

all parts of the Union where such suits are brought in the
252 courts of the several states, as well as in the Federal Courts.

Second. The Supreme Court of Mississippi further erred in its construction of the act of Congress, the Employers' Liability Act, in that it held that an action can be maintained by an administrator of a deceased railroad employe to recover damages for and suffered by the mother of the deceased, although the deceased employe left a widow him surviving.

In both of said particulars the Supreme Court of Mississippi

denied to plaintiffs in error their rights under said acts of Congress and under the Constitution and laws of the United States. Especially did the court deny plaintiffs in error the equal protection of the law under the said Federal statute, in violation of the provisions of said statute and of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the law.

Plaintiffs in error, therefore, pray a reversal of the final judgments of the Supreme Court of Mississippi in this cause and for the dismissal of the suit; but should the court fail to find the dismissal of the suit warranted by the record, then plaintiffs in error pray for the reversal of the judgments of the Supreme Court of Mississippi and the award of a new trial, so that justice may be done.

And as in duty bound plaintiffs in error will ever pray.

ROBERT H. THOMPSON,
Attorney for the Plaintiffs in Error.

253 THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of Mississippi, Greeting:

Because in the record and proceedings and also in the rendition of judgments of a plea which is in the said Supreme Court of Mississippi before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in said state, between Cheney Harris, administratrix of the estate of Van Harris, deceased, the plaintiff in the court of original jurisdiction, and the New Orleans & Northeastern Railroad Company, the defendant in said court, and the United States Fidelity & Guaranty Company of Baltimore, surety on the appeal bond given by the said railroad company to appeal said cause from the court of original jurisdiction to the Supreme Court of Mississippi, decided by the Supreme Court of Mississippi against said railroad company and the said surety on its bond, wherein was drawn in question in said suit the proper construction of an act of Congress, commonly designated as the Employers' Liability Act, 35 Federal Statutes at Large, page 65, and the amendment thereto, and in the giving in charge to the jury by the court of original jurisdiction and the approval thereof by the Supreme Court of Mississippi of a statute of the State of Mississippi, Mississippi Code 1906, Section 1985, as amended Laws Mississippi 1912, page 290, ch. 215, relating to the burden of proof and in the holdings, findings and decisions of the Supreme Court of Mississippi to the effect that the said suit was maintainable for the recovery of damages against the defendant, the damages suffered by and to be distributed to the mother of the deceased railroad employe, for whose death the suit was brought, wherein it distinctly appears that the deceased employe left a

widow him surviving, manifest error happened to the great damage of the New Orleans & Northeastern Railroad Company and to the United States Fidelity & Guaranty Company of Baltimore, surety on its said appeal bond, as by their complaint appears.

254 We being willing for the error, if any hath been, to be duly corrected, and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right, according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 5th day of July, in the year of our Lord one thousand nine hundred and sixteen.

[Seal U. S. District Court, Southern District of Mississippi.]

L. B. MOSELEY,

*Clerk of the United States District Court
for the Southern District of Mississippi.*

Allowed, to operate as a supersedeas by

SYDNEY SMITH,

Chief Justice of the Supreme Court of Mississippi.

255

Clerk's Certificate.

Supreme Court of Mississippi.

STATE OF MISSISSIPPI,
Hinds County:

I, George C. Myers, Clerk of the Supreme Court of the State of Mississippi, being the Court of said State which has highest, last and final jurisdiction of all pleas and causes pending in the Courts of said State, do hereby certify that the foregoing are full true and correct copies of the papers, each and all of them, containing the record in the said Supreme Court of the State of Mississippi in the case of New Orleans & North Eastern Railroad Company versus Cheney Harris, Administratrix, No. 18049 on the docket of said Court, as the same appear of record on file in said Court.

I further certify that in obedience to the writ of error in this cause granted by Honorable Sydney Smith, Chief Justice of the Supreme Court of Mississippi, and issued by Hon. L. B. Moseley, Clerk of the Federal Court of the Southern District of Mississippi, a copy of which is now on file in my office, I have this day forwarded to the Clerk of the Supreme Court of the United States, Washington, D. C., by express the transcript of the record in said cause, as commanded in said writ of error.

Given under my hand and seal of said Supreme Court of Mississippi, at Jackson, Mississippi, this the 24th day of July 1916 and in the one hundred and fortieth year of the Independence of the United States of America.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS, *Clerk.*

256 UNITED STATES OF AMERICA, ss:

To Cheney Harris, administratrix of the estate of Van Harris, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington City, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of Mississippi, wherein the New Orleans & Northeastern Railroad Company and United States Fidelity & Guaranty Company are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Sydney Smith, Chief Justice of the Supreme Court of the State of Mississippi this the 5th day of July in the year of our Lord one thousand nine hundred and sixteen.

SYDNEY SMITH,

*Chief Justice of the Supreme Court
of the State of Mississippi.*

THE STATE OF MISSISSIPPI,
*County of Lauderdale,
City of Meridian:*

On this the 7th day of July, 1916, personally appeared before me, a Notary Public in and for the said city, county and state, at my office in the said city, county and state, John W. Blanks, who makes oath and says that he delivered a true copy of the above and foregoing citation to Cheney Harris, administratrix of the estate of Van Harris, deceased, on the 7th day of July, 1916.

J. W. BLANKS.

Sworn to and subscribed before me this the 7th day of July, 1916, as witness my hand and official seal.

[Seal A. C. Hulett, Notary Public, City of Meridian,
Lauderdale Co., Miss.]

A. C. HULETT,
Notary Public.

Endorsed on cover: File No. 25,512. Mississippi Supreme Court. Term No. 682. The New Orleans and Northeastern Railroad Company and United States Fidelity and Guaranty Company, plaintiffs in error, vs. Cheney Harris, administratrix of the estate of Van Harris, deceased. Filed September 28th, 1916. File No. 25,512.

FEB 14 1918

JAMES D. WAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 276

**THE NEW ORLEANS & NORTHEASTERN RAIL-
ROAD COMPANY AND THE UNITED STATES
FIDELITY & GUARANTY COMPANY,**

Plaintiffs in Error,

versus

**CHENEY HARRIS, ADMINISTRATRIX OF THE
ESTATE OF VAN HARRIS, DECEASED,**

Defendant in Error.

**In Error to the Supreme Court of the State of
Mississippi.**

**Statement of the Case and Brief for Plaintiffs in
Error.**

**J. BLANC MONROE,
MONTE M. LEMANN,
ROBERT H. THOMPSON,
Attorneys for Plaintiff in Error.**

**L. E. JEFFRIES,
Of Counsel.**

January, 1918.

E. P. ANDREE PRG. Co., Brief Printers, 516 Natchez St., N. O. La.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 276

**THE NEW ORLEANS & NORTHEASTERN RAIL-
ROAD COMPANY AND THE UNITED STATES
FIDELITY & GUARANTY COMPANY,
Plaintiffs in Error,**

versus

**CHENEY HARRIS, ADMINISTRATRIX OF THE
ESTATE OF VAN HARRIS, DECEASED,
Defendant in Error.**

**In Error to the Supreme Court of the State of
Mississippi.**

**Statement of the Case and Brief for Plaintiffs in
Error.**

SYLLABUS.

- (1) The liability of interstate carriers to their interstate employees is a national, not a local question. Public policy requires, and the Federal Employers' Liability Act insists that that liability shall be uniform throughout the length and breadth of the land.

- (2) No State statute will be permitted to destroy the uniformity thus provided, or to impose upon interstate carriers a heavier burden than is imposed upon them by the Federal Act.
- (3) The Federal Employers' Liability Act imposes liability on the carrier only in case of negligence which negligence must be proven by plaintiff.
- (4) The Mississippi *prima facie* statute imposes liability on the carrier even when not negligent.
- (5) To apply that Mississippi statute to an interstate carrier is to deprive that carrier of a substantive right, given it by the act of Congress.
- (6) If that statute be applicable to a case arising under the Federal Act, then that statute unduly burdens interstate commerce, destroys uniformity of liability, violates the substantive constitutional rights of the defendant carrier, and is null and void.

If The Court Please :

This case comes to this Court in an effort to review and reverse a final decree of the Supreme Court of the State of Mississippi, rendered on June 5, 1916 (R., p. 151.)

That decree affirmed a judgment (R. p. 146), rendered October 8, 1914, by the Circuit Court of Lauderdale County, Mississippi (State Court), awarding to Cheney Harris, administratrix, the sum of \$2,000.00 damages for the death of her son, Van Harris. In her declaration (R., p. 2), Cheney Harris expressly stated that at the time of his death, on February 4, 1914, the said Van Harris was a railroad employee engaged in interstate commerce, that he was killed in the course of the operation of an interstate train, and that the liability of the de-

fendant "was secured by the Act of Congress of the United States in what is known as the Employers' Liability Act." The proof showed that Van Harris was engaged in interstate commerce at the time of his death. The fact that the case is governed by the Federal Employers' Liability Act is therefore not disputed.

The accident happened in *New Orleans, Louisiana*. The defendant railroad company has its domicile in New Orleans, Louisiana. There is in Mississippi a State statute known as the *prima facie* statute, which provides that recovery may be had from a railroad company upon mere proof of injury, without either allegation or proof of negligence in the defendant unless defendant affirmatively show its freedom from negligence. There is no *prima facie* statute in Louisiana. The suit was filed in *Mississippi*, and the Mississippi Courts, both original and appellate, held, over objection of defendant, that the Mississippi *prima facie* statute was applicable, notwithstanding the fact that the suit was expressly brought under the Federal Employers' Liability Act.

There was a conflict in the testimony as to whether the railroad company was guilty of any negligence which caused or contributed to the death of Harris; if one of plaintiff's witnesses, Dennis Thomas (R., p. 19) testified truthfully, there was negligence on the part of the company; if another of plaintiff's witnesses, Charles Strobel (R., p. 55) and the several witnesses for the defendant (R., pp. 71 to 137) testified truthfully, the company was guilty of no negligence whatever and was not liable.

This being the state of the evidence, at the conclusion of the trial, the trial Court, under the State practice (Mississippi Code 1906, §793) instructed the jury in writing grant-

ing (R., pp. 140-144) several separate charges to each of the parties. Among others, GIVEN at the request of the defendant in error, plaintiff in the trial Court, were (R., pp. 140, 141) instructions numbered 1, 2 and 3, in these words:

"No. 1. The Court charges the jury for the plaintiff in this case that under the Rule of Evidence in the State of Mississippi all that is required of the plaintiff in this case is to prove that injury was inflicted by the movement of the defendant's train or engine and then the law presumes negligence and then the burden of proof shifts to the defendant to prove all of the facts and circumstances surrounding the injury and from those facts so shown exonerate itself from all negligence."

"No. 2. The Court charges the jury for the plaintiff that under the rule of evidence under the Mississippi statute known as the *prima facie* statute, all that the plaintiff need prove to entitle her to a judgment or verdict is that the defendant's engine or train caused the injury complained of and then the plaintiff is entitled to a verdict at the hands of the jury unless the defendant has shown all of the facts surrounding the injury and from such facts has shown by a preponderance of the evidence that its servants were not guilty of negligence."

"No. 3. The Court charges the jury for the plaintiff that if you believe from the evidence that deceased was injured by the running of defendant's engine, then the burden placed on defendant by the *prima facie* statute cannot be met or overcome by mere speculation or conjecture, but it devolves on defendant the duty of showing by a preponderance of the evidence all of the facts and circumstances surrounding the injury and by such proof thus exonerate itself from negligence."

The railroad company, plaintiff in error, among others, requested the trial Court to give (R., pp. 145, 146) instructions numbered 1, 2, 5 and 6, but **THE COURT REFUSED TO GIVE THEM**; they are as follows:

"1. The Court instructs the jury for the defendant that there can be no recovery in this case under the Act of Congress known as the Employers' Liability Act, in the absence of negligence on the part of the defendant, and the burden is upon the plaintiff under this act to prove to your satisfaction by a preponderance of the evidence that the proximate cause of the injury and death of Van Harris was either the negligence of the defendant in failing to have the engine and car in question equipped with automatic couplers so that the engine and car could be coupled together without Harris having to go in between them, or the negligence of the engineer in the operation of the engine at the time and place of injury, and unless the plaintiff has shown this to your satisfaction by the greater weight of the testimony it is your duty to return a verdict for the defendant.

"2. The Court instructs the jury for the defendant that the evidence shows that Van Harris left a widow surviving him, and the plaintiff is not authorized to recover in this case any damages for the benefit of the mother of Harris, or to compensate her for the loss of his support.

"5. The Court instructs the jury for the defendant that under the Federal Employers' Liability Act which controls in this case, the plaintiff cannot recover unless she shows by the greater weight of the evidence that the proximate cause of the injury and death of Van Harris was the negligence of the defendant or its employees in the operation of the engine or in failing to equip the engine and car with automatic couplers.

"6. And the Court further instructs you that you are not authorized under this act to presume from the mere proof that Harris was injured by the running of the engine or cars of the defendant that the proximate cause of his injury and death was the negligence of the defendant or its employees, but you must determine whether the defendant was negligent or not from all the facts and circumstances in evidence, and unless you believe from the greater weight of all the evidence that the negligence of defendant was the proximate cause of Harris' injury and death, then it is your duty to find for the defendant."

A verdict was returned and a judgment rendered in the trial Court in favor of the plaintiff, defendant in error, from which, defendant after its motion for a new trial (R., pp. 146, 147) had been overruled, appealed to the Supreme Court of Mississippi. In the State Supreme Court the railroad company, plaintiff in error, sought a reversal of the judgment against it, (R. pp. 149-151) on the following grounds, there assigned as error, all presenting Federal questions, viz.

"Fourth. The Court below erred in overruling the defendant's motion, made, when the plaintiff rested her case, to exclude all the testimony introduced by the plaintiff and for a peremptory instruction in defendant's behalf (R., p. 111) because the proof failed to make out a case under the Federal Employers' Liability Act, and because it was affirmatively shown that the deceased, Van Harris, for whose death the suit was brought, left surviving himself a widow, and the plaintiff had no right to recover anything for the mother of the said Van Harris, the only beneficiary of the suit named in the declaration.

"Ninth. The Court below erred in giving each and every one of the instructions granted at the request of the plaintiff; this assignment is directed to each of said instructions separately and not to them jointly. In granting the instructions, and each of them, giving in charge to the jury the Mississippi *prima facie* statute (Code 1906, No. 1985, as amended) the trial Court denied appellant its rights under the Constitution and laws of the United States, and violated the Federal statute known as the Employers' Liability Act.

"Tenth. The Court below erred in refusing each of the instructions asked by the defendant and refused by the Court; this assignment is directed to each of said instructions separately and not to them jointly.

"Eleventh. The Court below erred in that it denied to the defendant rights to which it was entitled under the Constitution, laws and statutes of the United States, and particularly under the Act of Congress known as the Employers' Liability Act."

The State Supreme Court, without delivering any opinion whatever (R., pp. 151, 152), affirmed the judgment of the trial Court; enlarged it so as to make the surety on the railroad company's appeal bond jointly liable and added thereto a statutory penalty. The report of the case is to be found 71 *Southern*, 913, the conclusion of the Court being announced by the one word, "Affirmed." From this decision of the Supreme Court of Mississippi a writ of error has been prosecuted, and the case is now before this Court, and the following assignments of error (Rec., p. 157) are relied upon for a reversal, viz:

"First. The Supreme Court of Mississippi erred in deciding and holding that the giving in charge to

the jury by the Court of original jurisdiction of the statute of the State of Mississippi, Mississippi Code 1906, Section 1985, as amended Laws of Mississippi 1912, page 290, ch. 215, providing that in suits against railroad companies for injury to person or property proof that the injury was inflicted by the running of the cars or locomotives of the defendant company should be *prima facie* evidence of liability, and placing the burden of proof to show non-liability on the defendant company, was not error prejudicial to the railroad company, plaintiff in error. And it so erred because this was a suit, as shown of record, brought under the Act of Congress, commonly denominated the Employers' Liability Act, 35 U. S. Statutes at Large, 65, and the Act of Congress amendatory thereof, by which ruling the Supreme Court of Mississippi disregarded the manifest purpose of Congress that the said acts of Congress should be uniformly construed and enforced in suits brought thereunder in all parts of the Union, where such suits are brought in the Courts of the several States, as well as in the Federal Courts.

"Second. The Supreme Court of Mississippi further erred in its construction of the Act of Congress, the Employers' Liability Act, in that it held that an action can be maintained by an administrator of a deceased railroad employee to recover damages for and suffered by the mother of the deceased, although the deceased employee left a widow him surviving."

The statute of Mississippi, commonly called "The *prima facie* act," is found in Mississippi Code 1906, §1985, as amended laws of Mississippi, 1912, ch. 215, p. 290, and is in these words:

"1985. (1808). Injury to Persons or Property by Railroads *Prima Facie* Evidence of Want of Reasonable Skill and Care, Etc. In all actions against railroad corporations and all other corporations, companies, partnerships and individuals using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of the engines, locomotives or cars of any such railroad corporations or such other corporation, company, partnership or individual shall be *prima facie* evidence of the want of reasonable skill and care of such railroad corporation, or such other corporation, company, partnership or individual in reference to such injury. This section shall also apply to passengers and employees of railroad corporations and of such other corporations, companies, partnerships and individuals."

ARGUMENT.

I.

CONGRESS INTENDED TO ESTABLISH A UNIFORM RULE.

It will, we believe, not be denied that the Congress of these United States in enacting the Federal Employers' Liability Act, intended to establish a uniform rule which should govern the liability of interstate carriers for damages to interstate employees.

The intent was that liability should be the same, regardless of the locality in which the accident happened or in which the suit might be brought. This intent has been fully

recognized by this Court. This Court has said in 244 U. S., 147, *N. Y. C. R. R. v. Winnfield*, at p. 149:

"Whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein, are matters in which the Nation as a whole is interested and there are weighty considerations why the controlling law should be uniform and not change at every State line. *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S., 368, 378-379. It was largely in recognition of this that the Employers' Liability Act was enacted by Congress. *Second Employers' Liability Cases*, 228 U. S., 1, 51. It was drafted and passed shortly following a message from the President advocating an adequate national law governing all such injuries and leaving to the action of the several States only the injuries occurring in intrastate employment. *Con. Rec.*, 60th Cong. 1st. Session, 1347. And the reports of the Congressional Committees having the bill in charge, disclose without any uncertainty, that it was intended to be very comprehensive, to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws and to apply to them a national law having a uniform operation throughout all the States. *House Report No. 1386* and *Senate Report No. 460*, 6th Cong. 1st. Sess. Thus, in the House Report, it is said 'It (the bill) is intended in its scope to cover all commerce to which the regulative power of Congress extends—by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees. A Federal Statute of this character will supplant the numerous State Statutes on the subject so far as they relate to interstate commerce.

It will create uniformity throughout the Union and the legal status of such employer's liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the States.'

"True, the act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence, but this is because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier where, and only where, the injury results from negligence imputable to it. Every part of the act conforms to this principle, and no part points to any purpose to leave the State free to require compensation where the act withholds it."

244 U. S., 172, *Erie R. R. Co. v. Winnfield*:

"It (the Employers' Liability Act) establishes a rule of regulation which is intended to operate uniformly in all the States as respects interstate commerce and in that field, it is both paramount and exclusive."

233 U. S., 57, *Second Employers' Liability cases*; 244 U. S., 360, *N. Y. Central R. R. Co. v. Tonsellito*, to same effect.

II.

LIABILITY ONLY FOR NEGLIGENCE.

It will, we believe, not be denied that negligence on the part of the carrier is an essential prerequisite to a recovery under the Federal Employers' Liability Act.

241 U. S., 338, *Southern R. Co. v. Gray*:

"As the action is under the Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of common law as inter-

preted and applied in Federal Courts. *Seaboard Air Line v. Horton*, 223 U. S., 492, *Central Vt. Railway v. White*, 238 U. S., 507; *Great Northern Railway Co. v. Wiles*, 240 U. S., 444. **Negligence by the Railroad Company is essential to a recovery and there is not a scintilla of evidence to show this under the most favorable view of the testimony urged by counsel for defendant in error."**

244 U. S., 150, *N. Y. C. v. Winnfield*:

"True, the act, (Employers' Liability Act) does not require the carrier to respond for injuries occurring where it is not chargeable with negligence, but this is because Congress in its discretion acted upon the principle that **compensation should be exacted from the carrier where and only where the injury resulted from negligence imputable to it.**"

244 U. S., 172, *Erie R. R. v. Winnfield*:

"The first question is fully considered in *New York Central R. R. v. Winnfield*, the opinion in which has been just announced *ante* (147), and it suffices here to say that for the reasons there given, we are of opinion that the Federal Act proceeds upon the principle which **regards negligence as a basis of the duty to make compensation and excludes the existence of such a duty in the absence of negligence** and that Congress intends the act to be as comprehensive of those instances in which it excludes liability as of those in which liability is imposed. It establishes a rule or regulation which is intended to operate uniformly in all the States as respects interstate commerce and in that field it is both paramount and exclusive."

See also, 239 U. S., 355, *S. A. L. R. R. Co. v. Koenecke*; 239 U. S., 54, *C. R. I. & P. R. Co. v. Devine*.

III.

**FEDERAL COURTS HAVE ALWAYS IMPOSED ON
EMPLOYEE BURDEN OF PROVING CARRIERS'
NEGLIGENCE.**

Elliott on Railroads, Sec. 1309:

"Evidence of employer's negligence. The employee who seeks a recovery for personal injury has the burden of proving a negligent breach of duty on the part of the employer."

179 U. S., 658, *Patton v. T. & P. Ry. Co.*:

"The plaintiff, an employee of the railway company, was injured while at work for it. With reference to his contention that the trial Court erred in directing a verdict for the defendant, and in failing to leave the question of negligence to the jury, this Court, after stating the facts, said:

" '(1) That while in the case of a passenger, the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish, that the employer has been guilty of negligence;

" '(2) That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; but the evidence must point to the fact that he was; and where the testimony leaves the matter uncertain, and shows that

any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is ^{not} for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion.' "

15 Wall., 524, *The Nitro Glycerine Case*:

"A party charging negligence as a ground of action must prove it. He must show that the defendant, by his act or by his omission, has violated some duty incumbent upon him, which has caused the injury complained of."

233 U. S., 80, *Southern Railway v. Bennett*:

"Of course, the burden of proving negligence in a strict sense is on the plaintiff throughout, as was recognized and stated later in the charge."

Richey's Federal Employers' Liability Act, Sec. 148 (p. 304):

"But in an action to which the evidence shows the Federal law is applicable and therefore supreme, the plaintiff cannot have the advantage of a state law providing that the proof of the existence of defects in appliances is *prima facie* evidence of negligence, sufficient to throw the burden of disproving negligence on the railroad company; or of a state law that there is a presumption of negligence from an injury caused by the running of cars or locomotives. Such rules are not rules of procedure. So in an action under the act the plaintiff cannot be required to prove himself free from negligence. In *Central Vermont R. Co. v. White*, 238 U. S., 507, 59 L. Ed., 1433, 35 S. Ct., 865, the Court said:

" 'But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other States, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further, and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those states the plaintiff is as much under the necessity of proving one of these facts as to the other; and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action. But the United States Courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal Courts have enforced that principle even in trials in States which hold that the burden is on the plaintiff. * * * Congress, in passing the Federal Employers' Liability Act, evidently intended that the federal statute should be construed in the light of these and other decisions of the Federal Courts. Such construction of the statute was, in effect, approved in *Seaboard, etc. R. Co. v. Moore*, 228 U. S., 433, 57 L. Ed., 907, 33 S. Ct., 580. There was, therefore, no error in failing to enforce what the defendant calls the Vermont rule of procedure as to the burden of proof.' "

218 Fed., 753, *In re Federal Biscuit Co.* :

"The burden was on the plaintiff to prove the negligence that was charged, and the evidence about inspection was at his command."

232 Fed., 353, *Canadian Pac. Ry. Co. v. Thompson*:

"In an action for the death of a railroad brakeman in a collision between a work train and a hand car, the burden is on the plaintiff to prove negligence of the railroad company. *Whitney v. New York, N. H. & H. R. Co.*, 102 Fed., 850, 43 C. C. A., 19, 50 L. R. A., 615, applied."

RES IPSA LOQUITUR.

Roberts (Injuries to Interstate Employees), Sec. 22, (p. 48):

"On the other hand, the Federal Circuit Court of Appeals for the Eighth Circuit decided that the doctrine of *res ipsa loquitur* was not applicable in actions by employees against carriers by railroad under the Federal Act. The decision of the Court in the *Fulgham case*, cited in the notes, was based upon former decisions of other national Courts including the Supreme Court of the United States in actions of general negligence but not under the Federal Employers' Liability Act. The national Courts prior to the passage of the Federal Act had uniformly held that the evidential rule of *res ipsa loquitur* was not applicable in actions for negligence between master and servant."

181 Fed., 91, *Midland Valley R. Co. v. Fulgham* (Circuit Court of Appeals, Eighth Circuit):

"The happening of an accident which causes an injury to a servant raises no presumption of any negligence or wrongful act of his master. The doctrine of *res ipsa loquitur* is inapplicable to actions between

employer and employee for injuries by negligence or wrongful acts.

"Conjecture is an unsound and unjust basis for a verdict. Substantial evidence of the facts which constitute the cause of action, in this case of the alleged defect in the lift pin lever and automatic coupler, is indispensable to the maintenance of a verdict sustaining the cause."

MISSISSIPPI STATUTE IMPOSES LIABILITY REGARDLESS OF NEGLIGENCE.

It will, we believe, not be denied that there are a large number of cases of injuries to interstate employees, in which the carrier though actually guilty of no negligence is unable (either because its witnesses were killed in the accident, or have died or disappeared or become hostile, or for other reasons) to make proof of its freedom from negligence. It is impossible for plaintiffs to prove negligence in the carrier, but it is also impossible for the carrier to prove that it was guilty of no negligence. In these cases, there is, as a matter of substantive law no liability upon the carrier. In these cases, the Federal Employers' Liability Act as passed by Congress and as administered and intended to be administered, in, we believe, practically all of the States of the Union except Mississippi, specifically exempts the carrier from any duty to pay damages to the injured employee. In Mississippi, however, this exemption from liability is roughly wrested from the interstate carrier. The so-called *prima facie* statute of that State, quoted *supra*, p. 9, as construed by the Supreme Court of Mississippi has the effect of directly thwarting the

intent of Congress as expressed in the Employers' Liability Act, and of imposing upon the carrier a very heavy burden of liability in such cases. As a result, we find that the uniformity of the rule laid down by Congress is destroyed and the very purpose for which the Federal Statute was enacted, is defeated. One measure of liability is used in Mississippi another in its adjoining States. Small wonder then that this suit was brought in Mississippi, although the accident happened in Louisiana and the defendant railroad is domiciled in Louisiana.

IV.

MISSISSIPPI STATUTE DEPRIVES DEFENDANT OF A SUBSTANTIVE RIGHT—BURDENS INTERSTATE COMMERCE.

This Court has not been slow to realize the wisdom of the aim sought by Congress. It has appreciated the value both to employees and carriers of uniformity of duty and liability *inter se*, regardless of State lines and in accordance with the clearly expressed intent of the Employers' Liability Act. It has consistently ironed out differences and levelled inequalities in the duties and liabilities imposed by that Statute, as administered in the various States. It has felt, as Mr. Justice Van Devanter expressed it in the *Winnfield* case "that Congress intends the act to be as comprehensive of those instances in which it excludes liability as of those in which liability is imposed." It has felt that the subject matter was national, not local, that the rights and duties of the respective parties remain the same regardless of the

tribunal or the locality in which they are asserted or resisted. If this theory be correct, and it must be indeed a bold spirit who would controvert it, then there is grave error in the record at bar, as shown by the facts stated *supra*. There was applied to the defendant in the case at bar a rule differing widely from the uniform rule adopted by Congress and applied in the other States of the Union. This Court has held in several cases that such a ruling was reversible error.

The first of the cases referred to is that of *Norfolk Southern R. R. v. Ferebee*, 238 U. S., 269 (April 23, 1915). In that case the question at issue was the application in a suit brought under the Federal Employers' Liability Act of a statute of North Carolina regulating practice upon new trials. It was contended in that case, as in this case, that the State statute related purely to remedy and to procedure, and that, therefore, it was applicable to suits under the Federal Act. This Court, however, denied this contention, laying down the broad rule in this general statement:

"A substantive right or defense arising under the Federal law cannot be lessened or destroyed by a *State rule of practice*." (Italics ours.)

This general statement is in itself sufficient to dispose of the present case; but the Court has also directly applied this statement to a case substantially on all-fours with the present case.

See *Central Vermont Lumber Company v. White*, 238 U. S., 507. In that case the plaintiff, the administrator of a deceased employee of the defendant, sued the defendant railway company in a State Court of Vermont under the Federal Employers' Liability Act for the benefit of the

decendent's widow and children, claiming damages for his death, occurring in its service. White, the deceased employee, was killed in a rear-end collision and it was determined that the defendant railroad company was guilty of negligence proximately causing the death. It was contended, however, by the railway company that White, the decedent, was himself guilty of contributory negligence and that the recovery should be diminished under the Employers' Liability Act because thereof; and the question arose and was a determinative one upon which party rested the burden of proof touching contributory negligence.

Under the laws of Vermont, as construed by its Supreme Court, in a long series of decisions, the burden in cases of this kind rested on plaintiff, not only to show that the defendant had been guilty of negligence, but, as well, that the person for whose death the suit was brought was not guilty of contributory negligence. The trial Court refused to hold that the Vermont rule, a rule of evidence, was applicable to the case, but did hold that the Employers' Liability Act was to be administered according to the general rule on the subject of the burden of proof established by the Federal Courts, placing the burden of proof on the defendant to show that the person for whose death the suit was brought was guilty of contributory negligence. This ruling was approved by the Supreme Court of Vermont, 87 Vt., 330, and the case was appealed by the railroad company to this Court. This Court, Mr. Justice Lamar delivering the unanimous opinion of the Judges, said:

"In this Court the argument was devoted principally to a discussion of this ruling—counsel for the railroad company earnestly insisting that 'the *lex fori* must determine all questions of evidence, in-

cluding that of the burden of proof. *Wharton on Conflict of Laws* (3rd. Ed.), Sec., 478b'. It was argued that there is nothing in the Federal statutes indicating an intent to change the State rule as to the burden of proof, and it is claimed that because of the Court's mistaken construction of the Federal Act the railway company has been deprived of a right to which it was entitled.

"There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations depend upon the law of the place where the suit is brought. *McNeil v. Holbrook*, 12 Pet., 89. But matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy but destroys the liability. *Phillips v. Grank Trunk Ry.*, 236 U. S., 622; *Boyd v. Clark*, 8 Fed. Rep., 849; *Hollowell v. Horwick*, 14 Massachusetts, 188; *Cooper v. Lyons*, 77 Tennessee, 597 (2); *Newcombe v. Steamboat Co.*, 3 Iowa (G. Greene), 295. In that class of cases the law of the jurisdiction, creating the cause of action and fixing the time within which it must be asserted, would control even where the suit was brought in the Courts of a State which gave a longer period within which to sue. So, too, as to the burden of proof. As long as the question involves a mere matter of procedure as to the time when and the order in which evidence should be submitted the State Court can, in those instances, follow their own practice even in the trial of suits arising under the Federal law.

"But it is misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of State procedure. For, in Vermont, and in a few other States, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further, and, as a condition of his right to recover, must also show (2) that he was not guilty. Plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action. But the United States Courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant. The Federal Courts have enforced that principle even in trial in States which hold that the burden is on the plaintiff. *Railroad v. Gladmon*, 15 Wall., 401 (1), 407-407; *Hough v. Railway Co.*, 100 U. S., 225; *Inland, &c. Co. v. Tolson*, 139 U. S., 551 (4), 557; *Washington &c. R. R. v. Harmon*, 147 U. S., 581; *Hemingway v. Ill. Cent. R. R.*, 114 Fed. Rep., 843. Congress in passing the Federal Employers' Liability Act evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal Courts. Such construction of the statute was, in effect, approved in *Sea Board Air Line v. Moore*, 228 U. S., 434. There was therefore no error in failing to enforce what the defendant calls the Vermont rule of procedure as to the burden of proof."

The only difference between the *White case* and the one at bar is this: In the *White case* the rule as to burden of

proof was one established by the decisions of the Supreme Court of Vermont. In the present case the State rule of evidence is a statutory one. This difference if material, is favorable to the present case. The Federal Employers' Liability Act, seeking uniform administration throughout the land, displaced State statutory enactments out of harmony with its purposes quite as much as it displaced the inharmonious laws of the State as determined by its highest judicial tribunals.

The language of this Court in the *White case* is specially applicable. It is therein said that

"It is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of State procedure. * * * Proof of plaintiff's freedom from fault is a part of the very substance of his case."

If the burden of proof as to contributory negligence is a part of the very substance of the case, surely the burden of proof as to primary negligence is a large part of the very substance of the case. Under the Employers' Liability Act plaintiff must allege and prove negligence in the defendant railroad. Under the Mississippi statute a plaintiff may recover without either alleging or proving negligence. Surely no one will seriously contend that the difference is not substantial.

This Court in the *White Case* dealt with a question of burden of proof. We are dealing in the case at bar with a question of burden of proof. In both cases the rule was a matter of substance. In truth we do not know any statute of Mississippi which is in fact more a matter of substance in railroad litigation than the

prima facie statute. There is no lawyer at the Mississippi bar who regards the *prima facie* statute as either a mere matter of form or procedure. They regard it as reaching the very vitals of railroad litigation.

239 U. S., 199, *Atlantic Coast Line R. R. Co. v. Burnett*:

"In dealing with the enactments of a paramount authority, such as Congress is within its sphere over the States, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure. *Central Vermont Ry. Co. v. White*, 238 U. S., 507."

239 U. S., 53, *C. R. I. & P. R. Co. v. Devine*:

"Previous decisions of this Court have conclusively established the exclusive operation of the Employers' Liability Act over the subject with which it deals, to the exclusion of all State statutes relating thereto."

242 U. S., 536, *Atlantic Coast Line R. Co. v. Mimms, Administratrix*:

"While it is true that a substantive Federal right or defense duly asserted cannot be lessened or destroyed by a State rule of practice, yet the claim of the plaintiff in error to a Federal right not having been asserted at a time and in a manner calling for the consideration of it by the State Supreme Court, under its established system of practice and pleading, a refusal of the trial Court and of the Supreme Court to admit the testimony tendered in support of such a claim, is not a denial of a Federal right which this Court can review, (*Baldwin v. Kansas*, 129 U. S. 52; *Oxley Staves Co. v. Butler County*, 166 U. S.,

648); and, therefore, for want of jurisdiction, the writ of error is dismissed."

244 U. S., 147, *New York Central R. Co. v. Winnfield*:

"Liabilities and obligations of interstate railroad carriers to make compensation for personal injuries suffered by their employees while engaged exclusively in interstate commerce are regulated both inclusively and exclusively by the Federal Employers' Liability Act, and Congress having thus fully covered the subject, no room exists for State regulation even in respect of injuries occurring without fault as to which the Federal Act provides no remedy."

241 U. S., 338, *Southern Ry. Co. v. Gray*:

"As the action is under the Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied in Federal Courts. *S. A. L. R. Co. v. Horton*, 233 U. S., 492; *Central Vermont R. Co. v. White*, 238 U. S., 507; *Great Northern R. Co. v. Wiles*, 240 U. S., 444. Negligence by the railway company is essential to a recovery and there is not a scintilla of evidence to show this under the most favorable view of the testimony urged by counsel for defendant in error."

See, also, *Michigan Central R. R. v. Vreeland*, 227 U. S., 59; *American R. R. of Porto Rico v. Didricksen*, 227 U. S., 145; *Gulf, Colo., etc., R. R. v. McGinnis*, 228 U. S., 173; *Garrett v. L. & N. R. R.* 235 U. S., 308; *Seaboard Air Line v. Horton*, 233 U. S., 492; *Southern Ry v. Prescott*, 240 U. S., 632.

In the case last cited, this Court held that:

"Under a stipulation in a bill of lading of an interstate shipment that the carrier shall be liable as

warehouseman only, for goods after arrival at destination and not removed within a specified time, the carrier is liable only for negligence, and if the loss admittedly occurred by fire, *the burden is on the plaintiff to prove negligence, notwithstanding the rule may be different under State law.*" (Italics ours.)

The rule thus recognized by this Court has been independently recognized and applied by two State Courts, the Supreme Court of Georgia and the Supreme Court of Florida, in cases identical with the present.

See *L. & N. R. R. Co. v. Kemp*, 140 Georgia 657 (79 Southeastern Reporter, 558); and *L. & N. R. R. Co. v. Rhoda*, 74 Southern Reporter, 19 (decided January 18, 1917.)

In the Georgia case, in a suit under the Federal Employers' Liability Act, the lower Court charged the jury that it might apply a State statute substantially corresponding to the Mississippi *prima facie* statute. Upon appeal this was held error, the Supreme Court of Georgia saying:

"The plaintiff has based his right of action upon the provisions of the Federal act referred to above; and the rights of the plaintiff and the liability of the defendant are to be determined by that act, and under the construction of its terms. So far as the subject-matter of this suit is concerned, the act of Congress supersedes the legislation of the State which would have covered the subject in the absence of Federal legislation; and, while the case was tried in the State Court, it is to be tried under the provisions of the Federal statute. That being true, apart from any consideration as to the correctness of the

charge in itself, the Court should not have charged the provisions of the State statute which raised a presumption in certain cases against a railroad company upon proof of injury by the running of its locomotives or cars."

In the Florida case, 74 Southern Reporter, 19 (decided January 18, 1917), the case was before the Supreme Court of Florida for the second time, the Court's decision on the first appeal having been reversed by this Court on a *per curiam* opinion, because of the erroneous application of the State statute to the Federal law.

See *L. & N. R. R. v. Rhoda*, 238 U. S., 608.

The case, was thereafter, again tried in the lower courts of Florida and again taken up to the Supreme Court of that State, where the attempt was made again to apply a *prima facie* statute in Florida corresponding to the Mississippi *prima facie* Statute.

The Supreme Court of Florida recognized that this point had in effect been disposed of by the prior decision of this Court in that particular case, as well as by the other related decisions of this Court. The charges given by the trial Judge in that case, which were excepted to by the defendant, were these:

"It devolves upon the plaintiff to prove by a preponderance of the evidence that the deceased, Clarence Rhoda, was killed by the locomotive of the Louisville and Nashville Railroad Company. Then it would devolve upon the Louisville and Nashville Railroad Company to prove by a preponderance of the evidence that it was not negligent in its acts.

"Where the plaintiff shows by his evidence that he has sustained damage and injury by the running

of an engine of a railroad company, he is entitled to recover therefor, unless the company makes it appear, or it does not appear by a preponderance of the evidence, either that he assumed the risk, or that the injury was not due to the negligence of the agents of the company in charge of such engine.

"If you find, after a consideration of the whole of the evidence, that the plaintiff's intestate, Clarence Rhoda, was killed by an engine of the defendant on its tracks, and you do not find from a preponderance of the evidence that he assumed the risk of injury, but the evidence is equally balanced in your minds between negligence and freedom from negligence on the part of the defendant's servants on said engine your verdict must be for the plaintiff."

(Note. The Court will note that this instruction is substantially the same as Instruction No. 1 given by the Court for the plaintiff in the case at bar.)

The Supreme Court of Florida said:

"The questions necessary to be determined are whether the State statute quoted below *conflicts with the Federal Act*; and, if it does not conflict, then whether the defendant has sustained the burden placed upon it by the State statute. If there is substantial conflict, the Federal act is paramount, and *whether the defendant successfully carried the statutory burden imposed by the local law is quite immaterial.*"

"The State statute as originally enacted in 1891, is entitled:

"'An Act Defining the Liabilities of Railroad Companies in Certain Cases.'"

"As re-enacted and brought forward in the General Statutes of 1916, the pertinent sections of the law are as follows:

" 'A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives or cars or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.'

" 'If any person is injured by a railroad company by the running of the locomotives or cars or other machinery of such company, he being at the time of such injury an employee of the company, and the damage was caused by the negligence of another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to recovery. No contract which restricts such liability shall be legal or binding.' (Sections 3148, 3150, Gen. Stats., 1906; Comp. Laws, 1914.)

"The Federal act was intended to be paramount and uniform in its operation upon the matters within its purview. This supremacy, and uniformity can be obtained only by excluding all local laws affecting the substantial rights of the parties that conflict with the Federal Act. The State law is intended to enforce a local State policy substantially different from that disclosed by the terms of the Federal act. The State law is long prior in date and cannot be regarded as an aid to the Federal act, but is apparently in positive and material conflict therewith. The local statute was not intended to cover subjects that are controlled by paramount Federal regulations.

"A Federal statute upon a subject exclusively under Federal Control must be construed by itself and cannot be pieced out by State legislation. If a

liability does not exist under the Employers' Liability Act of 1908, it does not exist by virtue of any State legislation on the same subject. (*Michigan Central R. R. vs. Vreeland*, 227 U. S., 59; 33 *Supreme Court*, 192; 57 L. Ed., 417; *Ann. Cases* 1941 C, 176.)

* * *

"Both the Federal acts and the State statutes above quoted define the liability of a railroad company in the cases of negligence covered by the enactments; and in so far as the State law in effect creates a liability by virtue of a presumption of negligence from 'damage done' unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company, the local statute conflicts with the Federal act in matters of substance, affecting liability. The Federal act contains no provision creating a rebuttable presumption of negligence that substantially affects the liability of defendant in this class of cases. It is not a question of whether the statutory presumption denies due process or equal protection of the laws as in *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S., 35; 31 *Sup. Ct.* 136; 55 L. Ed., 78; 32 L. R. A. (N. S.) 226; *Ann. Cases*, 1912, A., 463; but whether there is a material conflict between the local statute and the paramount Federal act affecting the liability imposed by the Federal act. See *Central Vt. Ry. v. White*, 238 U. S., 507; 35 *Sup. Ct.* 865; 59 L. Ed., 1433; *Ann. Cases* 1916 B, 252. The State statute is not so similar to the Federal act as to make it immaterial which law is applied. *Kansas City Western Ry. Co. v. McAdow*, 240 U. S., 51; 36 *Sup. Ct.*, 51; 60 L. Ed., 520. Nor is the difference in the acts a mere rule of evidence or a matter of procedure not affecting the substance of the liability. See *Central Vt. Ry. v. White*, 238 U. S., 507; 35 *Sup. Ct.* 865; 59 L. Ed.,

1433; *Ann. Cases* 1916 B, 252. The provision in the quoted State statute that is not contained in the Federal act does not relate to the jurisdiction of the State Court, *but relates to matters of substance affecting the liability of the defendant*, in that under the State statute *negligence and consequent liability is presumed from proof of an injury*, unless overcome by the defendant, whereas under the Federal act, considered in the light of prior Federal decisions, negligence of the defendant must appear from the evidence. *Patton v. T. & P. Ry. Co.*, 179 U. S., 658; 21 Sup Ct. 275; 45 L. Ed., 361; *Louisville & Nashville R. R. v. Kemp*, 140 Ga., 657; 79 S. E., 558; *Central Vt. Ry. v. White*, *supra*." (Italics ours.)

Referring now to the Mississippi Statute here in question, we find that in the *Thornhill Case*, 106 Miss., 411, 63 *Southern Reporter*, 679, the Supreme Court said:

"Prior to the enactment of this statute, if a jury was unable to find the facts and circumstances of an injury, no inference of negligence relative thereto could be drawn, and the verdict must have been for the defendant. Under the rule then in force, the Court could have very properly reinstructed the jury as requested by appellant, that 'if they are unable on their oaths to find from the evidence that the plaintiff was guilty of negligence causing the said injuries, they will find for the defendant.' The statute, however, reverses this rule, and now, when injury is shown, the facts and circumstances must be established; otherwise the verdict must be for the plaintiff."

In the case of *Railroad Co. v. Hicks*, 91 Miss., 273, 46 So., 360, that Court held that the statute should be inter-

preted precisely as if it had been written thus: "Proof of injury inflicted by the running of locomtives or cars of such company shall be *prima facie* evidence of liability on the part of the company."

In view of the construction which has thus been placed upon this statute, it is clear that this statute creates a new and substantive right, and is more than a mere local rule of procedure or practice. It is also clear that as thus construed the statute is in conflict with the Constitution of the United States.

POINT IMPORTANT.

The present is but one of several cases recently decided by the Supreme Court of Mississippi in which the Mississippi *prima facie* statute has been held applicable to suits under the Federal Employers' Liability Act, and in which redress is being sought in this Court.

The point involved is therefore one of great and constantly recurring importance. As we have shown, the Supreme Court of Florida and the Supreme Court of Georgia have both held *prima facie* statutes inapplicable. If the Supreme Court of Mississippi correctly holds its *prima facie* statute applicable, then we have the diversity and discordant result in the application of the same Federal law which this Court has recently, in so many cases arising under various Federal acts, declined to permit. If the decision of the Supreme Court of Mississippi rather than that of the Supreme Court of Georgia or Florida is correct, then an

employee of a common carrier residing in Mississippi (where a *prima facie* statute exists) may recover upon a state of facts which would not permit an employee residing in Louisiana (where a *prima facie* statute does not exist), to recover. In other words, where suit is brought in Mississippi, recovery may be had under the Federal statute because of the local Mississippi law, whereas, if the same accident is made the basis of a suit in Louisiana, the plaintiff could not recover under the Federal law upon precisely the same state of facts, because of the difference between the law of Louisiana and the law of Mississippi.

If this result is to obtain, then all uniformity in the application of the Federal law vanishes; and the rights of the employees of carriers engaged in interstate commerce will depend not upon the Federal law, but rather upon the law of the State where suit is brought.

Unless we are correct in our position that the Court below erred in giving in charge to the jury the *prima facie* statute, then the administration of the Federal Act in Mississippi will be materially and substantially variant from its administration in other States of the Union, wherefore, we insist that the Court below erred, and erred grievously and prejudicially to appellant, in giving the statute in charge to the jury; and the Supreme Court of Mississippi erred in approving the error of the trial Court.

If we are correct, the trial Court erred not only in giving at plaintiff's request the Mississippi *prima facie* statute in charge to the jury, but as well in refusing the first and sixth instructions asked by the defendant, advising the jury that the burden was on the plaintiff to prove defendant's negligence by a preponderance of the evidence, and the Supreme Court of Mississippi erred in approving of the error.

THE SECOND ASSIGNMENT OF ERROR.

The proof showed, by the uncontradicted testimony of plaintiff herself as a witness in her own behalf (R., pp. 13-16) that the decedent, Van Harris, for whose death the suit was brought, left a widow, one Mollie Harris, him surviving and alive at the time of the trial.

It further showed (p. 15) that said widow, Mollie Harris, had drawn Van Harris' pay and abandoned him when he was sick with small pox, and that she was no longer living with him although the marriage had never been dissolved. The present suit was instituted by Cheney Harris, the mother, in her capacity as administratrix, but the complainant avers

"that she (complainant) was the mother and dependent upon said Van Harris. She therefore sues and demands judgment against said defendant railroad company in the sum of \$10,000.00." (Rec., p. 3.)

No mention of a wife appears anywhere in the pleadings. This being the condition of the record, the defendant requested the trial Court to charge (Rec., p. 145) :

"The Court instructs the jury for the defendant that the evidence shows that Van Harris left a widow surviving him and the plaintiff is not authorized to recover in this case any damages for the benefit of the mother of Harris or to compensate her for the loss of his support."

This the trial Court refused to do, and the request is assigned as error.

The language of the Federal Employers' Liability Act imposes liability in a suit for the death of an employee brought by his or her personal representative, and the suit is by express statutory terms to be for the benefit of the surviving widow or husband and children of such employee. It further provides, however, that if there be no widow or husband or children of such employee, then (meaning then only) the suit will be for the benefit of such employee's parents. It is a condition precedent under the act to a suit for the benefit of the decedent's surviving parent or parents, that the decedent shall have left no widow or husband or child. *St. Louis, etc. R. Co. v. Geer*, 149 S. W. (Tex.), 1178. *Goen v. B. & O. R. R.*, 179 Ill. App., 566. *Roberts on Injuries to Interstate Employees*, Sec. 73.

In the case at bar, the pleadings show that deceased left a mother and made no mention of a wife. The suit is expressly brought to recover the compensation due to the mother. Obviously no such compensation is due since the deceased is survived by a wife and it would seem that defendant was entitled to have its motion for a peremptory instruction granted.

Granting, however, for the sake of argument, that the trial Court should not have gone that far, it would seem certainly to have erred in refusing to grant to defendant the charge just above quoted. In *Garrick v. L. & N. R. R. Co.*, U. S., 35 Sup. Ct., 32, this Court said:

"It is now definitely settled that the act disclosed two distinct and independent liabilities resting upon the common foundation of a wrongful injury; (1) liability to the injured employee for which he alone can recover, and (2) in case of death, liability to his personal representative "for the benefit of the surviv-

ing widow or husband and children and if none, then of the parents which extends only to the pecuniary loss and damage resulting to them by reason of the death."

Plainly the pecuniary loss and damage from the death of Van Harris, resulting to the widow who had drawn his pay and decamped when he had the small pox and had not seen him since, was a very different quantity from the pecuniary loss and damage to the mother with whom he was living and to whose support he was contributing at the time of his death. This being so, defendant was certainly entitled to have the jury instructed that the plaintiff was entitled to recover nothing for the benefit of the mother. The fact that the complaint asks for damages for the benefit of the mother, and for these damages only, made it essential that the jury should be enlightened on the point and we respectfully submit that the refusal of this charge was such error as would justify reversal on this ground alone. *Roberts, Injuries to Interstate Employees, Secs. 72 and 75; 244 U. S., 360, N. Y. Central R. R. v. James Tonsellito.*

For these reasons we respectfully ask a reversal of the judgment of the Supreme Court of Mississippi brought under review by the writ of error in this case.

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Of Counsel.

January, 1918.

Office Supreme Court, U. S.
FILED

FEB 20 1918

JAMES D. HANEN,
CLERK.

United States Supreme Court.

OCTOBER TERM, 1917.

No. 276.

NEW ORLEANS AND NORTHEASTERN
RAILROAD COMPANY, Et AL,

Plaintiffs in Error,

vs.

CHENEY HARRIS, Administrator,

Defendant in Error.

STATEMENT OF THE CASE AND BRIEF
FOR DEFENDANT IN ERROR.

THOMAS C. HAYES,

For Defendant in Error.

J. B. CHANDLER,

For Plaintiff.

United States Supreme Court.

No. 276

**NEW ORLEANS AND NORTHEASTERN
RAILROAD COMPANY, Et. Al.**

Plaintiffs in Error,

VERSUS

**CHENEY HARRIS, Administratrix,
Defendant in Error.**

**STATEMENT AND BRIEF FOR
DEFENDANT IN ERROR.**

**STATEMENT OF FACTS BY DEFENDANT
IN ERROR.**

In February, 1914, a young healthy Negro man about 25 years old was killed in the yards of the Plaintiff in Error at New Orleans, Louisiana, in the alleged negligent movement of an engine engaged in Interstate Commerce.

After the engine struck the cars to which it was being coupled and had stopped, the movements of the engine being controlled by signals from the deceased and after the deceased had gone in between the engine and car to couple the air hose, the engine without signal was backed from 2 to 5 feet and over the deceased.

The accident occurred in the yards at New Orleans and

the injured man after having been taken from under the wheels of the engine was carried to a box car and loaded into the car, and a switch engine pulled the car up to the other end of the yard where the injured remained until the arrival of the ambulance. The ambulance refused to take him, giving as their excuse, that Van Harris was then dying.

He must have lived quite a while after the injury. He was heard to groan.

Suit was brought by his mother, who was administratrix.

A verdict and judgment for Two Thousand Dollars was rendered and affirmed by the Supreme Court of Mississippi.

THE LAW OF THE CASE.

There was ample and sufficient evidence of negligence to take the case to the jury under the testimony—*independent of the rule of evidence*,—Statute.

Complaint is made, however, that the Mississippi *Prima Facie* Statute was given by instructions to the jury and that this was prejudicial error.

We will not cite the numerous authorities of the Supreme Court of Mississippi wherein it has been held that our Statute was merely a Rule of Evidence. Because this is not disputed by Counsel for plaintiffs in error.

And this construction of our Statute has been held constitutional by the Supreme Court of the United States in what is known as *M. J. & K. C. R. R. Co. v. Turnipseed*, 219 U. S., 35 L. Edd. 578. *Easterling & Co. v. Pierce*, 235 U. S., 59 L. Edd. 279.

The amendment of 1910 to section 6 of the Employers Liability Act expressly provides as follows:

"The jurisdiction of the Courts of the United States under this act shall be concurrent with that of the Courts of the several States."

This amendment was intended to confer full jurisdiction upon the State Court according to the best text writers and was an indication that prior to its adoption the State Court had no jurisdiction.

The Statute expressly declared by the amendment of 1910 that the action must be brought "In a Circuit (now District) Court of the United States.

1st. In the district of the residence of the defendant.

2nd. Or in which the case of action arose.

3rd. Or in which the defendant shall be doing business at the time of the commencement of the action.

But when the jurisdiction was conferred upon the State Courts by the amendment, no venue was fixed and Mr. Thornton in his excellent work at page 289 uses the following language in the text:

"Here resort must be made to the State Statutes."

And this same author in a note at the bottom of this page, says:

"No case on this exact point has come to my notice, and I think my text states the true rule. When Congress was stating in section 6 where an action might be brought, it had in mind the bringing of the action in a Federal Court, and not in a State Court, when it gave the right to bring the action in a State Court, it at the same time not only adopted the State procedure, but also the law relating to the venue."

Further this author at page 306 lays down the law to be that the court may permit an amendment of the complaint to

fit the evidence at its close but this depends upon the local state practice. See 199 Thornton—Local State Practice Controls.

The Revised Statutes of the United States Par. 721, Compiled Statutes Par. 1538 provide as follows: Under the heading Laws of the States Rules of Decision:

“The Laws of the several States, except where the constitution, treaties, or Statutes of the United States *otherwise require* shall be regarded as Rules of Decision in trials at Common Law, in the Courts of the United States, in cases where they apply.”

The general rule is that the laws of the several States shall be regarded as Rules of Decision in the Courts of the United States in cases in which they apply. “The Judiciary Act requires this and it would be the Law independently of the enactment.”

See also Section 1537 of the Compiled Statutes Annotated.

And under these sections the following annotations under Evidence:

The “Law of the several States” with respect to evidence within the meaning of this section apply not only to the Statutes but to the decisions of their highest Court’s citing.

Nashua Sav. BL. v. Angol. Am. L. Co. 189 U. S. 228.

Hinds v. Keith (cca) 57 Fed. 10.

Gornelly v. Clark, 134 U. S. 348.

Busches v. Cheshire R. R. 125 U. S. 583.

Ex Parte Fisk, 113 U. S. 720.

Belding v. Hebard (cca) 103 Fed. 532.

Wright v. Taylor 2 Dill (U. S.) 25.

Stewart v. Morris (cca) 89 Fed. 289.

Berry v. Fletcher 1 Dill (U. S.) 66.

Nelson v. Killingly BK (cca) 69 Fed. 798.

U. S. v. Hall 53 Fed. 352.

U. S. v. Dow Faney (U. S.) 34, etc.

And in the case of *U. P. R. R. v. Yates* (cca) 79 Fed. 588, the court upheld this general rule but followed the construction of the Common Law as construed by the United States Courts.

And Further:

"Rules of evidence prescribed by the laws of the State are to be observed in the trial of causes, in the Federal Courts sitting within the State, the only exception being provided for by the Statutes of the United States."

Parket v. Moore 111 Fed. 470, and *Mutual L. Ins. Co. v. Union Trust Co.* 112 U. S. 250, *Camden R. R. v. Statson*, 177 U. S. 172.

In this last cited case the Supreme Court of the United States in passing upon the question certified to it from the United States Circuit Court of Appeals Third Circuit.

Held that a State Statute authorizing trial court to order a physical examination of injured party was binding upon the Federal Courts in the face of the policy of the United States Courts and in direct conflict with the *Botsford* case 35 L. Edd. —Sup. Ct. of U. S., page 739. Where it had been held that no such authority existed in the Federal Courts under the Common Law.

It will be noted that the Employer's Liability Act and its amendment are dead silent as to the methods, quantity and quality of proof of negligence.

The State law is applicable, therefore, in determining what is proper proof and sufficient proof. See 199 Thornton.

It was, under this statement of the Rule, held that proof that the injury was caused by defective appliances made out a prima facie case of negligence on the part of the railroad that being the Rule under the State Courts.

Bennett v. Southern Ry. (S. C.) 79 S. E. 710.

And in another case it was said of the Federal Act: "The State of Kentucky, makes the mere proof of the existence of defects in appliances prima facie evidence of negligence, and that having been shown it throws the burden of disproving negligence upon the employer."

South Covington, etc. vs. Finan—153 Ky. 340. (155 S. W. 742).

Rules of State Law as to pleading, evidence and procedure should be conformed to except as modified by the Act.

McAdaw v. Kansas, etc. R. R. 165 S. W. 185.

Fleming v. Norfolk, etc. R. R. 76 S. E. 212.

Louisville, etc. R. R. v. Johnson, Admx. 161 Ky. 824. 171 S. W. 877.

Central Vermont R. R. v. White 238 U. S. 508.

Sec. 164 Roberts Injury to Interstate Emp.

The State Law, the Statute Laws of the State should be applied to action in Federal Courts under such pleadings, evidence and burden of same.

163 U. S. 142.

134 U. S. 418.

164 U. S. 403.

101 U. S. 688.

Vol. 2 U. S. Digest, page 1755, et. seq.

The Legislature may determine which party shall have the burden of proof and that any evidence however alight shall make a prima facie case.

Vol. XI. Am. & Eng. Enc. Law, Page 551, Citing—

Wm. Hoffman vs. Quincey, 4 Wall (U. S.) 535.

Maison vs. Halle, 12 Wheat (U. S.) 370.

and a great number of State authorities.

Vol. 10 Ruling Case Law, page 862—

"There can be no doubt respecting the general power

of a state to prescribe rules of evidence which shall be observed by its judicial tribunals. It is a matter concerning its internal policy, etc."

Law Governing—There can be no doubt respecting the general power of a state to prescribe the rules of evidence which shall be observed by its judicial tribunals. It is a matter concerning its internal policy over which its legislative department necessarily has authority, limited only by the constitutional guaranties respecting due process of law, vested rights, and the inviolability of contracts.

Bowlin v. Com., 2 Bush (Ky.) 5, 92 Am.

Dec. 468; Pennsylvania Co. v. McCann, 54 Ohio.

St. 10, 42 N. E. 768, 56 A. S. R. 693, 31 L. R. A. 651.

The rules of evidence pertain to the remedy, and usually are the same whether the cause of action in which they are applied arises within or without the state whose tribunal is investigating the facts in contention between the parties before it. Nor is it material in this respect whether the parties are residents or non-residents of the State. The law of evidence in its ordinary operation is no more affected by one of these considerations than by the other. No extra-territorial effect is given to a statute creating a rule of evidence by the fact that the rule is applied to the trial of a cause of action arising in another state, or to the trial of an action between parties who are non-residents. If the tribunals of a state obtain jurisdiction of the parties and the cause, it will conduct the investigation of the facts in controversy between them according to its own rules of evidence which is, simply, to follow its own laws within its own borders.

Bowlin v. Con., 2 Bush (Ky.) 5, 92 Am. Dec. 468;
 Pennsylvania Co. v. McCann, 54 Ohio St., 10, 42 N. E.
 768, 56 Am. S. R. 695, 31 L. R. A. 651; Heaton v. El-

dridge, 56 Ohio St., 87, 46 N. E. 638, 60 A. S. R. 737. 36 L. R. A. 817; Union Cent. L. Ins. Co. v. Pollard, 94 Va. 146, 26 S. E. 421, 64 A. S. R. 715, 36 L. R. A. 271. See also Conflict of Laws, vol. 5, p. 1045.

Sec. 5, R. C. L. p. 863—State Decisions in Federal Courts.—Inasmuch as the law of evidence is part of the law of procedure, it is generally true that the law of the forum determines questions in respect thereof.

It has become well settled that in a suit involving the title to land the courts of the United States will follow state decisions upon questions of evidence.

Note: 16 Ann. Cas. 568.

Sec. 6. R. C. L. p. 863—Legislative Power to Prescribe Rules of Evidence.—The general power of the Legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations, it is not easy to define precisely what they are. So long as the legislature, in prescribing rules of evidence, in either civil or criminal cases, leaves a party a fair opportunity to make his defense and to submit all the facts to the jury to be weighed by them, upon evidence legitimately bearing upon them, it is difficult to perceive how its acts can be assailed upon constitutional grounds.

Of course the Federal Congress is not authorized to prescribe rules governing the admissibility of evidence in the state courts.

Sec. 7 R. C. L. page 864—Laws Making Certain Facts Presumptive Evidence.—Statutes declaring what shall be presumptive or prima facie evidence of any fact have been held by the weight of authority to be constitutional and valid, unqualifiedly in civil cases.

State v. Thomas, 144 Ala. 77, 40 So. 271, 113 A. S. R. 17, 6 Ann. C. S. 744, 2 L. R. A. (N. S.) 1011; Wooten v. State, 24 Fla. 335, 5 So. 39, 1 L. R. A. 819;

Chicago, etc., *R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 41 A. S. R. 278, 24 L. R. A. 141; *Meadowcraft v. People*, 163 Ill. 56, 45 N. E. 303, 54 A. S. R. 447, 35 L. R. A. 176; *State v. Beach*, 147 Ind. 74, 46 N. E. 145, 36 L. R. A. 179; *Rose v. State*, 171 Ind. 662, 87 N. E. 103, 17 Ann. Cas. 228; *Jones v. Hickey*, 80 Kan. 109, 102 Pac. 247, 133 A. S. R. 190; *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759, 36 A. S. R. 668 and note. Note: 6 Ann. Cas. 746.

See also Constitutional Law, vol. 6, p. 462. Vol. 5, R. C. L. page 1045, Conflict of Laws.

Sec. 136 Vol. 5, R. C. L.—Application of Rule to Question of Evidence.—The weight of authority as well as sound principles of reason, is in accordance with the rule that questions of evidence are governed by the law of the forum, and that such law determines the admissibility, competency, quality and degree of evidence. Whether a witness is competent or not, whether certain matters need to be proved by writing or not, whether certain evidences prove a certain fact or not, are to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it. If the law of the forum requires a certain mode of proof, a contract, although valid, cannot be enforced in that jurisdiction without the proof required there. The evidence by which a contract shall be proved is no part of the contract itself, but its admission or rejection becomes a part of the proceedings on the trial, where its competency and sufficiency must be determined. When the required evidence is lacking, the courts must refuse the enforcement of the contract; and it seems clear that a statutory regulation prescribing the mode or measure of proof necessary to maintain an action or defense pertains to the remedy controlling the procedure of the forum in administering the remedy. A statute of the state of the forum in derogation of the rules of evidence

as established elsewhere will, for the reasons stated, as to contracts entered into in another state, be obeyed and executed in any action brought to enforce such contract in former states. A federal court is governed, in actions tried by it, by the federal statute governing the admissibility of evidence of transactions with persons since deceased, rather than by the statute of the state in which it is sitting.

In the Zachery Case, 58 L. Edd., Sup. Ct., 591, the Supreme Court upheld the construction of the state courts holding Lessor of Interstate Carrier liable for the negligence of the Lessee to the Lessee's servant and this under the Employers' Liability Act although the Act itself expressly limited the right of action to "every common carrier by railroad while engaged in commerce between—shall be liable in damages to any person suffering injury while he is employed by such carrier, etc."

In the Kearney case, 60 L. Edd., Sup. Ct., 762, the court applied the state statute in construing the "next of kin" clause of the Employers' Liability Act and affirmed a judgment and award of damages to the legitimate children of the same mother (the mother being dead) for the death of an illegitimate child of that mother, the employee killed.

In the case of Minn. St. L. Ry. v. Bombole, 60 L. Edd., Sup. Ct., U. S. 211, and followed by many subsequent decisions on same point.

The Supreme Court of the United States upheld and applied the State Statute making less than 12 juror verdict legal in the face of the Constitution of the United States requiring 12 juror verdict.

The White case relied upon by appellant is not authority for their position, we respectfully submit:

The railroad company undertook to defeat the rights given under the Employers' Liability Act by appealing to a rule of the Connecticut Decisions—not based on any State

Statute but purely a rule of decision of the State based upon the common law, and this rule of decision of State court construing the common law was not followed by the Federal Court, but the Federal Court followed its own decisions construing the Common Law Doctrine of contributory negligence and placed the burden upon the defendane to plead and prove contributory negligence. This decision is manifestly just and right and in no wise upholds the construction placed upon it by the appellant. The very case is cited under the contrary text supra.

If the contention of appellant was true and a different rule of evidence be held to apply in the trial of such cases in a State Court where the Statute fixed the Rule of Evidence in other cases not arising under the Federal Liability Act, the darkest confusion would occur. One day a trial under one Rule of Evidence followed by a trial under entirely different Rules of Evidence—and this would bring about an unheard of condition of affairs.

The only other case cited by Counsel is the case of *L. & N. R. R. v. Rhoda* (Fla.) 74 So. 19. It appears that this case was before the Supreme Court of Florida on a former appeal, was affirmed by that Court and on Writ of Error—reversed by the Supreme Court of the United States, 59 L. Edd. 1487.

This former decision, 71 So. 369, was partially based upon a statute of the State of Florida, designated in its caption, "3148 Defines the liability of railroads in certain cases"—Judge Whitfield and Judge Taylor strongly dissented from the affirmance in the first decision upon two propositions:

1st. On the question of the damages under the instructions.

2nd. On the applicability of the "Liability Statute" referred to.

The Supreme Court of the United States never referred to the question of applicability of the "Rule of Liability" or

"Rule of Evidence" referred to in the second ground of dissenting opinion of the State Court, but reversed the case upon authority of:

Michigan Cent. v. Vreeland, 57 L. Edd. 417.

Am. R. Co. v. Dedrickson, 57 L. Edd. 456.

G. C. & S. F. v. McGinnis, 57 L. Edd. 785.

Garrett v. L. & N. 57 L. Edd. 242.

In the Vreeland case the Supreme Court only passed upon two propositions:

1st. The court held that a statute of the state creating a survival of the right of action when the Liability Act was silent on the subject was in conflict with the Act.

2nd. The measure of damages.

No where did the Supreme Court pass upon the application of the State Liability or Rule of Evidence Statute.

In the Dedrickson case the Supreme Court of the United States:

The reversal is based upon the error of State Court in allowing the jury to consider the loss of society and companionship of a son as elements of damages under Employers' Liability Act.

This was the only point decided in the case.

In the McGinnis case, the Supreme Court reversed the case solely because damages were awarded for Mrs. Sanders when she had suffered no pecuniary loss.

In the Garrett case, the questions presented and decided were:

1st. Whether Admr. could recover under the Act for benefit of estate of deceased.

2nd. Question of pleading under the Act.

This case went up solely on question of pleading and because of defective pleading and counsel having declined to amend same all along the line, although suggested by the several Courts. The Supreme Court affirmed.

We submit that in none of these cases was the question of a Rule of Evidence decided.

Yet when the case gets back to the Supreme Court of Florida, it falls to Judge Whitfield to write the opinion in the case—in which Judges Taylor, Browne, Shackelford and Ellis concur—in which the following language is used:

“Both the Federal acts and the State (Fla.) Statutes above quoted define the liability of a railroad company in the cases of negligence, etc.”

“And holds that the State Statute conflicts with the Federal Act in matters of substance affecting liability” and is therefore superseded.

Of course the State's Courts construction of its own Statutes to the effect that it goes to the substance and is not a mere Rule of Evidence would be conclusive perhaps upon the Supreme Court of the United States—

But the Rhoda decision is properly decided upon the testimony we submit and it was therefore under the construction of the evidence placed upon it by the Supreme Court of Florida, properly decided—

Our Statute is very unlike the Florida Statute *supra*.

Our Statute comes under the Chapter of Evidences and begins, “In all actions against Railroad's proof of the injury inflicted by the running, etc., shall be *prima facie* Evidence, etc.”

We have no serious apprehension but that our State Courts will adhere to its Rulings on our *prima facie* Statute and continue to construe same as a mere “Rule of Evidence.”

In the White case *supra*, the Supreme Court of the

United States expressly said, speaking through Justice Lamar for a solid Court:

"There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, *Rules of Evidence* and the Statute of Limitations depend upon the Law of the place where the suit was brought."

McNeil v. Holbrook, 12 Pet. 89 (9 L. Ed. Page 1011) etc.

In conclusion we beg to call the Court's attention to the instructions Nos. 1 to 11, inclusive, granted the defendant, by which instructions the jury was told where the burden of proof must preponderate and we earnestly submit that the defendant had his theories most favorably submitted to the jury in all sorts of forms. In fact, the trial court charged the jury by instruction No. 11, that the prima facie Statute must yield to the facts in evidence, etc.

So we say how can the appellant complain of granting of the Prima Facie Instruction.

All of the instructions are taken together and taking all instructions together the appellant is most favorably treated, in fact, too favorably treated.

The case of Norfolk S. Ry. vs. Ferribee 238 Va. 270, is no authority for Petitioner in this case. In that case the Supreme Court affirmed the State Supreme Court when judgment had been rendered on a former reversal for new trial as to damages only.

The case of Southern Ry. vs. Gray 241 Va. 333, is no authority for petitioner we submit, for all of the facts were in evidence and under the Mississippi Law the Railroad would have prevailed.

In the case of R. R. vs. Divine, 239 Va. 53. The State Statute sought to be interposed by the R. R. Company was one

fixing a different measure of damages than that of the Federal Act. This case did not touch on the manner or method of proving negligence.

In the case of the Railway vs. Prescott 240 U. S. 632.

The court there was passing upon the State Rule of decision, not a statute, and this Rule of Decision was in conflict with the Interstate Commerce Act and the Rules and Regulations under same. And is not, I submit, authority for Petitioner.

AS TO THE MEASURE OF DAMAGES.

There is ample evidence in the record for a finding by the jury that deceased suffered for quite a time after the accident and before death, and the amount awarded could be reckoned as damages, suffered by deceased for conscious pain and suffering.

There is no satisfactory evidence in the record that Van Harris was legally married, or when, or that his alleged wife was never divorced.

It might have been seven or ten years since she left Van, but we say as to all of this, the Mississippi Statutes fix a method of raising such a point and precludes any other method.

Sec. 722 of Code of Mississippi 1906.

NON-JOINDER OR MIS-JOINDER OF PLAINTIFFS.

The non-joinder or mis-joinder of a plaintiff shall not be objected to by the defendant, at the trial unless he gives a written notice thereof with his plea, stating the names of the persons alleged to be omitted or improperly joined; and the court or judge, at any time before the trial of the issue, whether of law or fact, may allow the Declaration or Writ to be amended so as to obviate the objection, upon such terms as may be proper.

No such notice was given by the defendant.

And besides all this, how can the Plaintiff in Error avail itself of this alleged error?

There could be but one suit. The suit had to be brought by the Personal Representative.

Would not the damages have been far greater for the wife than for the mother, assuming that the record shows indisputably that Van Harris left a living legal wife and that the defendant could set this up without conforming to the Statute Supra?

Would this Honorable Court reverse this case because of this assignment where an award of Two Thousand Dollars is given to the mother for the death of a son?

If deceased left a widow, even though separated from deceased at the time, under the evidence in this case would not her damages have been much greater? So we say that Plaintiff in Error was not prejudiced by this alleged error, if error there was.

And besides that if there is a lawful widow, she can protect her rights as against the administratrix.

We also beg to call the Court's attention to the fact that the Writ of Error in this cause does not conform to the Petition for the Writ presented to the Chief Justice of the Supreme Court of Mississippi, and that the above discussed error was not assigned in the Petition.

See Transcript, pages 152, 153, 154, 155.

We respectfully submit that this cause should be affirmed.

THOS. G. FEWELL,

For Defendant in Error.

Copy of foregoing Brief is acknowledged by us, this 12th day of February, 1918.

J. BLANC MONROE,

MONTE M. LEMON,

ROBERT H. THOMPSON,

Attys. for Plaintiffs in Error.

**NEW ORLEANS & NORTHEASTERN RAILROAD
COMPANY ET AL. v. HARRIS, ADMINISTRA-
TRIX OF HARRIS.**

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 276. Argued April 30, 1913.—Decided June 3, 1913.

In actions against a railroad for injuries to employees resulting from its negligence, it has long been the rule of the federal courts that the negligence is to be established affirmatively by the plaintiff.

In proceedings brought under the Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied by the federal courts; and negligence is essential to recovery.

Hence it is erroneous in such a proceeding to apply a state statute (Mississippi Code, 1906, § 1985, and Laws 1912, c. 215, p. 360),

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making proof of injury by an engine propelled by steam *prima facie* evidence of a railroad's negligence in an action against it for damages.

Under the federal act, there is no cause of action for pain and suffering if the employee die of his injuries without regaining consciousness.

Under that act, no cause of action accrues for the benefit of a dependent mother where the deceased employee leaves a widow who, although she lived apart from him at the time of his death, was neither remarried nor divorced and where the rights and liabilities consequent upon their marriage had not ceased under the local law.

Reversed.

This case is stated in the opinion.

Mr. J. Blanc Monroe with whom *Mr. Monte M. Lomann*, *Mr. Robert H. Thompson* and *Mr. L. E. Jeffries* were on the brief, for plaintiffs in error.

Mr. Thomas G. Fewell and *Mr. C. B. Cameron*, for defendant in error, submitted.

Mr. Justice McRaynolds delivered the opinion of the court.

While employed in interstate commerce by plaintiff in error, a common carrier by railroad then engaging in such commerce, Van Harris a brakeman was run over by the tender of an engine moving in the yard at New Orleans, Louisiana—February 5, 1914. He died within a few minutes without regaining consciousness. Having qualified as administratrix, his mother (defendant in error), charging negligence and relying upon the Federal Employers' Liability Act, sued for damages in a state court for Lauderdale County, Mississippi. A judgment in her favor was affirmed by the Supreme Court without opinion.

The declaration contained no averment of conscious pain or suffering by deceased. It alleged: "That by reason of the negligence hereinabove set out, the defendant railroad company is liable for the killing of said Van Harris and the administratrix is given the right to sue by the Act of Congress, she therefore brings this, her suit, and demands judgment against the defendant for the sum of ten thousand dollars." It further charged that the dead son had been his mother's sole support but contained no reference to his widow.

One witness who claimed to have seen the accident gave evidence tending to show negligence by the railroad; but his presence at the scene was not left free from doubt and other eye witnesses narrated the circumstances differently. Concerning deceased's contributions to his mother's support, she said he was her sole dependence, paid her house rent, gave her something to eat, looked after her, was regularly at work and would bring home thirty or forty dollars a month. Her statements are the only evidence concerning the son's marriage and widow. He duly married Mollie on an undisclosed date; after living together for six months he fell ill and she left; thereafter her whereabouts were unknown to him; she was alive at time of trial (October, 1914); he left no child. Nothing indicates a divorce proceeding. Answering "Do you know whether Mollie ever married anybody else or not?" the witness replied, "I don't know sir; I hear them say she married."

Upon request of the administratrix, the following instructions (among others) were given to the jury:

"No. 1. The court charges the jury for the plaintiff in this case that under the rule of evidence in the State of Mississippi all that is required of the plaintiff in this case is to prove that injury was inflicted by the movement of the defendant's train or engine and then the law presumes negligence and then the burden of proof shifts to the

defendant to prove all of the facts and circumstances surrounding the injury and from those facts so shown exonerate itself from all negligence.

"No. 2. The court charges the jury for the plaintiff that under the rule of evidence under the Mississippi statutes known as the *prima facie* statute all that the plaintiff need prove to entitle her to a judgment or verdict is that the defendant's engine or train caused the injury complained of and then the plaintiff is entitled to a verdict at the hands of the jury unless the defendant has shown all of the facts surrounding the injury and from such facts has shown by a preponderance of the evidence that its servants were not guilty of negligence.

"No. 3. The court charges the jury for the plaintiff that if you believe from the evidence that deceased was injured by the running of defendant's engine, then the burden placed on defendant by the *prima facie* statute cannot be met or overcome by mere speculation or conjecture, but it devolves on defendant the duty of showing by a preponderance of the evidence all of the facts and circumstances surrounding the injury and by such proof thus exonerate itself from negligence."

"No. 8. The court charges the jury for the plaintiff in this case that if your verdict shall be for the plaintiff then it should be in such sum as you may believe from the evidence would fully compensate the deceased for his pain and suffering, if any have been shown by the evidence, and the value of his life reckoned according to the American Mortality table had the deceased survived and that such amount or the measure of same is peculiarly within the province of the jury reckoned as above outlined. And that the law does not require the plaintiff to prove the damages in dollars and cents but the amount thereof is to be fixed by the jury in all not to exceed the sum of ten thousand dollars."

The so-called "Prima Facie Act" of Mississippi set

out below ¹ provides, that in actions against railroads for damages proof of injury inflicted by an engine propelled by steam shall be *prima facie* evidence of negligence. Relying upon and undertaking to apply this statute, the trial court gave the quoted instructions; and in so doing, we think, committed error.

The federal courts have long held that where suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish. *The Nitro-Glycerine Case*, 15 Wall. 524, 537; *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 663; *Looney v. Metropolitan R. R. Co.*, 200 U. S. 480, 487; *Southern Ry. Co. v. Bennett*, 233 U. S. 80, 85. In proceedings brought under the Federal Employers' Liability Act rights and obligations depend upon it and applicable principles of common law as interpreted and applied in federal courts; and negligence is essential to recovery. *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 501, 502; *Southern Ry. Co. v. Gray*, 241 U. S. 333, 339; *New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 150; *Erie R. R. Co. v. Winfield*, 244

¹ Mississippi Code 1906, § 1985, as amended by c. 215, Laws 1912, p. 290.

"1985 (1808). *Injury to Persons or Property by Railroads Prima Facie Evidence of Want of Reasonable Skill and Care, etc.* In all actions against railroad corporations and all other corporations, companies, partnerships and individuals using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of the engines, locomotives or cars of any such railroad corporations or such other corporation, company, partnership or individual shall be *prima facie* evidence of the want of reasonable skill and care of such railroad corporation, or such other corporation, company, partnership or individual in reference to such injury. This section shall also apply to passengers and employees of railroad corporations and of such other corporations, companies, partnerships, and individuals."

U. S. 170, 172. These established principles and our holding in *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 511, 512, we think make it clear that the question of burden of proof is a matter of substance and not subject to control by laws of the several States.

It was also error to give quoted instruction number eight. Since the deceased endured no conscious suffering he had no right of action; and possible recovery was limited to pecuniary loss sustained by the designated beneficiary. *Garrett v. Louisville & Nashville R. R. Co.*, 235 U. S. 308, 312; *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U. S. 485, 489.

The act makes the widow sole beneficiary when there is no child and only in the absence of both may parents be considered. The deceased left a widow and although they had lived apart no claim is made that rights and liabilities consequent upon marriage had disappeared under local law. Of course, we do not go beyond the particular facts here disclosed. In the circumstances, proof of the mother's pecuniary loss could not support a recovery.

The judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.